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INTRODUCTORY STATEMENT.

Owing to the much, but unavoidably, delayed appearance of this August number of the magazine, a few items appear in it which relate to matters occurring subsequent to August. As the date of the magazine is a mere matter of formal detail, however, it seemed best to include these later items in this number, because of their current interest, rather than to postpone their appearance.

F. W. G.

PRELIMINARY NOTICE OF ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION.

The annual meeting of the Association this year will be held in Worcester probably on Saturday, December 18. Please hold the date open if you are planning to come to the meeting.

The Second Report of the Judicial Council will be filed with the governor in print on November 30. The Secretary has ordered reprints of the report from the State printer which will be bound up in the MASSACHUSETTS LAW QUARTERLY and sent to members as soon as possible after the report is filed in order that they may have an opportunity to read it and discuss it at the annual meeting as was done last year in the case of the first report.

The business meeting and discussion will be held in the morning followed by a luncheon, probably at the Hotel Bancroft.

After the luncheon, it is planned to show some pictures on the screen in the manner which has been followed successfully at the Bench and Bar Meetings in Boston during the past two years.

We hope to make the meeting interesting and that as many members will come as can arrange to do so. A fuller notice will be sent out later.

F. W. GRINNELL, *Secretary.*

EXTRACT FROM THE "OUTLINE FOR THE DEVELOPMENT OF THE QUARTERLY" IN THE FEBRUARY NUMBER OF 1916.

"It is, perhaps, needless to say that the publication or reprinting of the views of any individual or of material from any other publication in this magazine does not in any way commit either the Association or the members of the Publication Committee to the views expressed. Such publication simply means that, in the opinion of the Committee, the views expressed are likely to be found useful, or suggestive, and are sufficiently concise and well-written expressions of considered professional opinion on appropriate subjects to merit publication."

TWENTY-FIVE YEARS OF THE BOSTON LEGAL AID SOCIETY

The Boston Legal Aid Society has recently published a pamphlet containing an interesting account of its first twenty-five years which deserves the attention not only of the bar but of the public generally. It is prepared by Albert F. Bigelow, president of the Society. Copies may be obtained at the office of the Society, 16A Ashburton Place, Boston.

In 1920 President Coolidge, then Governor of Massachusetts, wrote to the Society, "Your society has always been, though perhaps quiet and unobtrusive, a force in the community that made for the preservation of law and order. The future presents to the Society an opportunity to combat among the people the spread of seductive foreign doctrines tending to undermine our institutions. I know the Society will continue to receive wide-spread public support in order that its efforts may not diminish."

As an introduction to the present pamphlet appears a letter from Governor Fuller.

Governor Fuller's Letter

April 14, 1926.

Albert F. Bigelow, Esquire,
President, Boston Legal Aid Society,
16A Ashburton Place,
Boston, Massachusetts.

My dear Mr. Bigelow:

May I, as a citizen and as Governor, congratulate the Boston Legal Aid Society upon its quarter century of service in aid of those who might otherwise be deprived of the equal protection of the laws.

The ideal of the Commonwealth is to protect every citizen against crime and to guarantee to every citizen the enforcement of his honest claims and legal rights through the administration of justice. The attainment of this ideal, however difficult it may be, is one of the most important tasks of government.

Provision must be made for those who need and are entitled to the protection of the law but cannot pay for it. Otherwise denial of justice is certain to result and it is in our great cities, such as Boston, that the situation is most acute.

Between 1922 and 1925 Legal Aid Societies increased in number from forty-eight to seventy-two. For the most part these, like the parent society in New York, were voluntarily financed and managed by lawyers. The motives were charitable but something more. If the poor are to be made good citizens of the Republic, if the nation as a whole is to escape a corroding hypocrisy, there must be one justice for all. The Legal Aid Society is a monument to the intelligence and the patriotism of the American bar.

There is none the less something anomalous, something deeply disquieting, in a nation that is forced to rely upon private initiative and voluntary contributions to safeguard constitutional rights. "It seems to me," says Judge Taft, "that ultimately these instrumentalities will have to be made a part of the administration of justice and paid for out of public funds." Mr. Root agrees that "methods may be evolved which can ultimately be applied by government," but adds: "Those methods cannot be evolved out of anybody's inner conscience or out of any legislative committee; they must be worked out experimentally, and that must be done by organized private enterprise." It is a problem of constitutional development, of the adaptation of fundamental law to conditions rapidly changing.

For more than twenty-five years the Boston Legal Aid Society, under charter from the Commonwealth has dedicated itself to the task of helping the poor to secure legal justice and has served about seventy thousand men and women. The Society exercises a direct influence in behalf of law and order from which the whole community benefits. Such an organization is indispensable and merits generous public support.

Very truly yours,

ALVAN T. FULLER.

The following figures summarize the growth of the Society's work:—

Year	New Cases Received	Total Expenses	Collected for Clients
1901	198	$ 1,401	$ 586
1905	664	1,587	5,917
1910	1,175	2,964	6,687
1915	2,229	5,617	25,196
1920	4,625	20,856	45,046
1925	7,759	34,740	106,075
Total for 25 Years	69,250	$285,365	$639,171

Note.

For a discussion of Legal Aid Societies and Public Defenders see Report of Judicature Commission of Massachusetts, pp. 124–126, MASSACHUSETTS LAW QUARTERLY for January, 1921.

NOTICE FROM THE COMMITTEE ON REPEAL OF OBSOLETE LAWS.

222 STATE HOUSE, BOSTON, MASS.

AUGUSTUS LORING, *Chairman*
FELIX FRANKFURTER
ARCHIE N. FROST
GEORGE LOUIS RICHARDS
GEORGE P. DRURY, *Secretary*

The Commission on the Repeal of Obsolete Laws, appointed under Chapter twenty-five of the Resolves of 1926, for the purpose of studying the general and special laws of the Commonwealth with a view to recommending to the General Court the repeal of such thereof as have become obsolete or superfluous or have ceased to have any appreciable effect or influence on existing rights, would be glad to receive any suggestions as to any laws which, in your opinion, come within the foregoing description.

Yours respectfully,
Commission on Repeal of Obsolete Laws
By GEORGE P. DRURY,
Secretary.

THE FUNCTION OF THE SUPERIOR COURT IN REGARD TO AWARDS UNDER THE MASSACHUSETTS COMMERCIAL ARBITRATION ACT OF 1925

The position of an arbitration award before the Court under the new Arbitration Act is not generally understood. The Editor was recently asked to explain it.

Ever since 1786, we have had a law in Massachusetts by which parties could, by agreement, refer a dispute to arbitration after the dispute had arisen and be bound by that agreement. Not much use was made of the law, however. Lawyers, in general, have always been critical of arbitration as a method of settling disputes and the reasons for this in the 19th century, as well as the practice under the earlier law are set forth quite fully in Colby's "Practice," Chapter IV (see also MASSACHUSETTS LAW QUARTERLY for Jan. 1924, p. 52, and Nov. 1925, pp. 60–61). Colby's book published in 1848 was the Massachusetts *Practice* work in common use in its day, but is now generally forgotten by the profession. It contains a fuller connected account of the law relating to arbitration than any other Massachusetts work.

The new Massachusetts law of 1925, Chapter .... was passed to meet the desire of many business men for a law which would render agreements to arbitrate made before any dispute had arisen enforceable without technical objections. Accordingly, to-day, whether an agreement to arbitrate is made either before or after a dispute has arisen, the award of the arbitrators is binding and may be enforced. And as to the right of jury trial on the issue of existence of the agreement see *Boyden* v. *Lamb*, 152 Mass. at p. 420.

When the arbitrators have made their award, if the person against whom the award is made settles in accordance with the award, as has usually been the case in arbitrations in the past, there is of course no occasion for filing the award in court. The whole matter remains private. But if the party does not accept the award and settle, then it is the duty of the arbitrators under the new Massachusetts act to report their award to the Superior Court and when accepted and confirmed by the court, the court will enter judgment thereon which shall be final. Any question of law *may*, and upon the request of *all* parties *shall*, be referred by the arbitrators to

the court to which the report is to be made, or, upon application by any party at any time before the award becomes final, the Superior Court *may in its discretion* instruct the arbitrators upon a question of substantive law. "A question of substantive law" does not mean questions on the law of evidence or methods of proceeding, but a question of law which governs the ultimate rights of the parties on the facts which the arbitrators find. All questions of evidence are left to the final decision of the arbitrators within the reasonable standards of fairness. The decision of the Superior Court on a question of law submitted to it would be subject to appeal to the Supreme Judicial Court, but if the Superior Court decided that there was no question of substantive law involved on which the interests of justice required the court to instruct the arbitrators, there would be no appeal from this decision and the court would enter judgment, which would be final. Ordinarily questions of law are not likely to be raised in such arbitrations.

Aside from questions of law which may be thus raised, the opportunities to contest an award before the court fall within narrow limits. They are not specified definitely in the statutes because they have been long settled in Massachusetts by the Supreme Judicial Court under the earlier arbitration law which has existed for more than a century. The sort of case in which the award will not be treated as conclusive by the court has been described by Colby as follows:

> "Where the referee, through the fraud or management of one of the parties, or through mistake or inadvertence, acted upon the belief of some fact as true, which was not true, and thus came to a result which, but for that mistake or inadvertence, he would not have come to. This, of course, does not extend to matters of fact, which were controverted before the referee, and made the subject of legal investigation by evidence or otherwise. In all such cases, the decision of the referee is conclusive, and the evidence will not be re-examined by the Court." A good illustration of the sort of case in which the Court will interfere was mentioned by Chief Justice Shaw many years ago in Boston Water Power v. Gray 6 Met. 131, "viz: Suppose, in running lines, a compass was used, which had been disturbed by a magnet, so placed as to disturb the action of the needle, and this wholly unknown to the arbitrators; and after their award was made, the error should be discovered and proved to the satisfaction of the Court; it would be [the Court's] duty to set aside or recommit the report."

Obviously this sort of opportunity for attacking an award before the court is very limited. Of course, any clear case of misconduct or unfairness on the part of the arbitrators would, and should, be examined by the court. The theory of an arbitration is that the arbitrators shall act as judges to give each party a "square deal" and not to act as agents of one party or the other. As the New York Court of Appeals recently has said, an arbitrator

> "must lay aside all bias and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the case. He should sedulously refrain from any conduct which might justify the inference that either party is the special recipient of his solicitude or favor." The parties "are entitled to expect that arbitrators will proceed with indifference and with impartiality."

Chief Justice Rugg said in a recent case,

> "Mere inadequacy of an award honestly made without mistake is no ground for setting it aside. The parties, having chosen their tribunal, are bound by its decision no matter what may be its infirmities or judgment . . . As there is no allegation of mistake, that may be laid out of the case. But the plaintiff is entitled to an honest award free from the taint of fraud or prejudice. An award might be so grossly and palpably below the actual loss as to afford intrinsic evidence of fraud, bias or prejudice. But, in order to reach this point, the inadequacy of the award must be . . . strong, gross and manifest . . ."

These are the rules and standards of the new Massachusetts statute and of the arbitration rules recently adopted by the Boston Chamber of Commerce. They are practicable and fair. The further development of the use of arbitration to settle commercial disputes will depend upon the extent to which the confidence of business men is established in this form of tribunal for those who choose it. Its development rests more with business men than with lawyers. The success of business men in establishing confidence in the system will depend on the extent to which they observe in practice the rules and standards above described.

F. W. G.

JUDICIAL NOTICE OF FOREIGN LAW UNDER THE NEW MASSACHUSETTS STATUTE (ST. 1926, C. 168).

Following the recommendation of the Judicial Council for the reasons explained in its first report, pp. 36–39 (reprinted in MASSACHUSETTS LAW QUARTERLY for Nov., 1925), the legislature adopted the following statute:

> "C. 168 *An Act Concerning the Law of Other Jurisdictions.*
>
> Be it enacted, etc., as follows:
>
> *Section 1.* Chapter two hundred and thirty-three of the General Laws is hereby amended by striking out section seventy and inserting in place thereof the following:
>
> *Section 70.* The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material.
>
> *Section 2.* Sections seventy-one and seventy-two of said chapter two hundred and thirty-three are hereby repealed." Approved March 30, 1926.

As stated by Mr. Dodge in his address on "Judicial Councils" before the American Bar Association in Denver (*A.B.A. Journal* for Aug. 1926, p. 582) this statute did away with "the time-honored farce of submitting questions of foreign law to the jury as questions of fact". Under the new statute, questions of foreign law are to be passed upon by the judge alone as he would pass on questions of domestic law, he being specially trained and appointed for that purpose, instead of confusing a jury with law books.

The Editor has been asked, since the passage of the statute, as to what a judge is to do when there is no available source of information at hand as to what the law of some distant country may be, if it is material, and how far the provision for "judicial notice" of such law reaches. The answer seems to arise out of the necessities of the situation. The fact that the court is to take judicial notice of the law of Connecticut or of France or of some other place does not relieve counsel on one side or the other from his duty as counsel to assist the court in answering questions whether domestic or foreign. If the law is readily available, like the law of Massachusetts or the law of Connecticut, in law libraries at hand, no question is likely to arise. If it is not readily available, however,

and counsel interested in establishing that the law of some distant country governs the case and is to such and such an effect, does not assist the court with his authorities, the court is not called upon to make unreasonable researches in foreign law on its own motion and would be obliged to fall back upon reasonable presumptions that the law of such places is similar to the law of Massachusetts for the purposes of the case at hand unless satisfactory information to the contrary is produced. It is noticeable that the Supreme Judicial Court has already done this since the statute took effect in Vogel's case, decided July 19, 1926 (advanced sheets 627 at p. 629). Chapter 168 took effect thirty days from March 30, 1926, and was specifically cited in the opinion.

The new statute has simply gone the full length with the late James B. Thayer, who pointed out that when what was wanted was "the rule or law of the case" the same sort of question is presented whether the law be domestic or foreign and that as to all such questions "In reason, the judges might well enough be allowed to inform themselves about foreign law in any manner they choose, . . . but if it is required to be proved, it should be proved to the judge" (See "Preliminary Treatise on Evidence," p. 258). Professor Thayer also said,

> "Practical convenience and good sense demand an increase rather than a lessening of the number of instances in which courts shorten trials, by making *prima facie* assumptions, not likely, on the one hand, to be successfully denied, and, on the other, if they be denied, admitting readily of verification or disproof," (p. 300).

Dean Wigmore described the condition cured by the new statute as follows: "The state law of another state is in theory that of an individual sovereign; hence its law equally with the laws of other nations, will in theory not be noticed by courts of another of the United States. But this theory is now antiquated hypocrisy as applied in this field and there is a wholesome tendency to abandon it." (Evidence, § 2573, vol. V, p. 584.) The new statute abandons it in Massachusetts.

In many cases, it will be possible either for counsel or the court to ascertain by correspondence with the local consul of a particular country or through the State Department at Washington what the rule of law is in a particular country on a particular subject. We are informed that the Probate Court for Worcester County has recently accepted the statement of the Consul in New

York of Lithuania and has repeatedly taken notice that the Code Napoleon prevailed in Turkey and that under it no administration, as we know it, was ever taken out on the estate of a deceased person, but that his property goes immediately to certain persons. That court has also in several instances made a decree of distribution, directing payment of the intestate estates to certain beneficiaries, who were really the heirs of original distributees, who had died since the death of the decedent and in doing so the court has accepted the statement of a resident Consul of those countries. In other cases it has accepted the statement of a United States Consul in such countries. In other words, it did not require administration on the estates of distributees. This has proved a great convenience in several cases where foreigners have died in this country, leaving parents as their only heirs, according to our law, which parents during the course of distribution died in some foreign country, leaving other children to whom the court ordered distribution, in accordance with the laws of descent in those countries. Doubtless a similar course has been followed in other courts. Inquiry of the librarian of such extensive libraries of foreign law as that of the Harvard Law School may also result in producing satisfactory information on any particular question. Such are the avenues of probably accurate information which are expressly opened up for counsel and for the bench to produce conveniently prompt results by this statute freed from technical questions which might be involved in more elaborate methods of proof.

It has been pointed out that "presumptions" as to the law of another state or country "involve at least a preliminary dash of judicial notice" (Thayer's Cases on Evidence, Maguire's edition, p. 25 note). For instance, when the Supreme Judicial Court said in Vogel's case, already referred to, "It is to be presumed that in all civilized countries a parent is obliged to support his minor children," it is really taking judicial notice of a principle of law which runs through the government of civilized countries. Under this new statute this limited kind of notice may be resorted to from necessity by the courts, just as they resorted to it before the statute, but the necessity will arise on fewer occasions because they may take fuller notice of all sources of information. For a brief suggestive note on "presumptions" see *Central Law Journal* for April 20, 1926, pp. 131–132.

The intimate relation between the judicial processes of "presumption" as to foreign law and "judicial notice" of foreign law

in the mind of a distinguished judicial administrator appears in *Chase* v. *Alliance Ins. Co.,* 9 Allen 311. In that case, in which Sidney Bartlett (or more probably his junior associate) seems to have been caught napping in the drafting of an agreed statement of facts by B. R. Curtis (or his junior), the court in the opinion by Judge Hoar seems to have taken judicial notice of the law of England for the purpose of declining to follow it and then relied upon the "presumption" that the common law of Scotland was like that of Massachusetts, at the same time doing what was pretty nearly taking judicial notice, as far as decisions are concerned, by stating that they had examined the Scottish law and had discovered that it had not been definitely decided.

While there has been much talk in opinions to the effect that the law of another state or country is to be "proved as a fact," such language, as Wigmore points out, results from theories of distinct sovereignties having no real relation to the essential nature of the relative functions of court and jury. Under the English practice a question of Irish law which would have been a question of fact in the Scotch court and as to which there was no evidence offered became a question of law on appeal to the House of Lords which took judicial notice of Irish law (*Cooper* v. *Cooper,* L. R. 13 A. C. 88). So in this country a question of Connecticut law involved in a case going to the Supreme Court of the United States from the state courts of Massachusetts in Pemberton Square would under the earlier law have been treated as a question of fact while the same question of Connecticut law if arising in a case from the Federal Courts of Massachusetts in Post Office Square would be a question of law. Under the new statute it will be a question of law in each case.

As Thayer and Wigmore have pointed out, there never was a time when *all* questions of fact were required to be decided by a jury. The meaning of a written instrument, when closely considered is a question of fact in one sense, but, for ordinary purposes, since the process of ascertaining it "looks like a frog and jumps like a frog," it has always been called "a frog", so to speak, and we talk of it often as a question of law and it has always been treated as a question for the court and not the jury. So with questions of the law of other jurisdictions—they are, and always have been, essentially questions of "the law of the case"—the difference being in accessibility of information at times which was doubtless the historical reason for the rule about "proving it

as a fact''. That practice started at a time when the law of any state or country, even one's own, was often hard to get at. The reason for the old practice has disappeared since all law became more accessible. So far as presumptive or administrative rules of proceeding are concerned—such practice as reasonable necessity requires without defeating the purpose of the statute seem open to the courts under the new statute as already suggested.

In cases in which the judge is called upon to charge a jury in regard to foreign law as to which he believes there is some uncertainty, an appropriate course for him to follow would seem to be to ask the jury for an answer as to the facts and to reserve leave under the statute to enter a different verdict if it should appear that he was mistaken in regard to foreign law. (G. L., c. 231, § 120.) This sort of case seems a particularly appropriate one for such procedure (see explanatory note submitted to the Judiciary Committee of the Legislature in 1915 by the late John L. Thorndike, the draftsman of the statute, St. 1915, c. 185, reprinted at the end of the Report of the Committee on Legislation of the Massachusetts Bar Association for 1915).

We believe that the new statute should be liberally construed to accomplish its purpose, which is a timesaving and more intelligible procedure than has hitherto existed, and that when the question of practical administration of this new statutory ''judicial notice'' is studied there will be no serious difficulty in its application. It appears that in some states, as was formerly true in Massachusetts, the appellate courts consider themselves confined on appeal to a consideration of the information as to foreign law which was acted on by the judge below and that they refuse to reverse his decision even though their wider sources of information as to the foreign law show that he was mistaken.

We believe such a practice to be unsound. The question before an appellate court is, and should be primarily, not whether they are to sustain the judge below, but how justice shall be administered in the case before them. We believe that the language of the new act when reasonably interpreted accomplishes the purpose of throwing open every source of information as to the law of any place to every court whether at the original trial or on appeal.

F. W. GRINNELL.

Note.

For another interesting discussion of the old practice of proving law to a jury see Wigmore on Evidence, 2d edition, Vol. V., sec. 1558 Note.

COSTS

I. Suggestions Drawn from Sir John Hollams' "Jottings of an Old Solicitor"

In its admirable First Report the Judicial Council of Massachusetts under the heading of "Undue Amount of Litigation and Nominal Costs" suggests a change of principle on the subject of costs in Massachusetts litigation. The report, while recognizing that such a change "is in direct conflict with Massachusetts traditions" concludes "a change should be made and (that) a system of substantial costs should be adopted."*

Much of the argument of the Council to support this change is drawn from the supposed beneficial working of the English cost system, especially in its effect in diminishing litigation.

Bills of costs in English litigation are fearsome and wondrous things. English literature is replete with ill-natured and feeling jokes about solicitors' bills of costs which fail to recognize any unalloyed blessedness in the system. Large solicitor's offices have a "Cost Clerk" who specializes on the subject so that every penny may be scientifically looked after and fought for before a "taxing master." Appeals on questions of costs may be taken before the Courts and the English reports contain litigation about costs which we escape in jurisdictions where the Massachusetts theory of nominal costs prevails. It is not proposed here to argue this issue in its different aspects or on its merits. We only call attention to some observations of an English solicitor on this subject selected from his memoirs written after a long and successful career at the English bar.

Sir John Hollams was consulted by the Common Law Commission of 1851 and was on several subsequent occasions requested to give evidence before Parliamentary Committees of each House as to contemplated changes in the law. In 1867 he was appointed as the only London Solicitor member of the Judicature Commission. This commission had as members three Lord Chancellors and the leading judges and lawyers of the day and sat for seven years to consider and inaugurate reforms in procedure. Again in 1881 he was appointed by the Lord Chancellor—the Earl of Selborne—a member of a committee to consider changes in the business of the courts. Besides this he sat by special appointment on many

* First Report of the Judicial Council of Massachusetts, pp. 63–64.

other law reforming committees including that composed of himself, Lord James of Hereford and Lord Bowen to inquire into the administration of the office of Public Prosecutor and Treasury Solicitor. In recognition of his services in 1902 he was knighted and lived to be the senior member of the Council of Law Society.

In 1906 he wrote some of his experiences and observations as a solicitor under the title of "Jottings of an Old Solicitor". He has this to say on the subject of law costs as administered in England:

"The enormous cost of trials, frequently very disproportionate to the pecuniary importance of the case, has naturally tended to drive business away from the Courts and to induce disputants to resort to unsatisfactory arbitration or compromise of just claims."[1]

"In the present day it is impossible to give any reasonable estimate as to the time within which the litigation must end, or as to the expense which it may involve. Almost every decision is subject to the risk of appeal to the Court of Appeal, and from that Court to the House of Lords, and those successive appeals may conceivably happen more than once in the same case. The practical mischief from this unrestricted right of appeal arises from the modern system introduced by the Courts, without express legislative authority, of allowing the successful appellant the cost of the Appeal and of the decision appealed from. Formerly this was unheard of, and consequently even when there was power to appeal it was not exercised, for the unsuccessful litigant knew that even if the appeal should be successful he would have to pay his own costs, and if it was unsuccessful, the costs of his opponent also. Now, what the *Times*, some time back, aptly described as the 'gambling element', has been introduced into litigation, the stake constantly increases with successive appeals, and encouragement is given by one final effort to throw the whole costs on the hitherto successful party. In many cases this has been the result, and many suitors in actions involving questions open to different views, have had reason greatly to regret that in the first, and it may be also in the second, Court they were successful. It is said that logically it is right that the party decided to be in the wrong should bear the cost, but even those who defend the present system do not fully carry out this view, for admittedly the taxed costs which the unsuccessful party has to pay are often much less than the costs incurred, and no one suggests that the successful litigant shall bear the costs of issues on which he has failed, although reasonably raised—or indeed that he shall be indemnified with respect to possible mistakes by his counsel or his solicitor. Such mistakes are a misfortune which admittedly he has to bear, and it does not seem unreasonable that a mistake made by the judge, or by the jury,

[1] Page 64.

should be treated as a common calamity. Certain it is that the present system operates very prejudicially to the profession, for unless there is a very large sum at stake, no one can, in a case open to reasonable doubt, advise a prudent man to incur the risks of litigation with a powerful opponent."[1]

"The view of the Judicature Commission was that the judge should have absolute discretionary power over the costs. This was somewhat modified by an amendment inserted in the bill in the House of Commons, and in practice there appears to be great disinclination on the part of some judges to exercise the power which, in this respect, they possess, although that power is, no doubt, somewhat restricted. It is not uncommon for a judge to say that the action is one which should not have been brought, but at the same time to refuse to deprive the plaintiff of his costs, whereas the logical result would seem to be that, if the action was one which ought not to have been brought, the plaintiff should not only be left to pay his own costs, but should also pay the costs to which he has unjustifiably exposed has opponent. The present system seems to favour frivolous and fraudulent claims. I recall a case in which the plaintiff claimed very heavy damages from a railway company, alleging, and calling a body of evidence to prove, that he was most seriously and permanently injured; but on the part of the railway company it was clearly proved that the plaintiff was shamming, and that symptons relied on by the plaintiff arose from self-inflicted acts. Ultimately the plaintiff had a verdict for thirty pounds instead of the thousands which he claimed, and to which he would have undoubtedly been entitled had his case been true. But although the plaintiff was practically convicted of gross fraud, he recovered his full costs, and of course the railway company had to pay the whole of the expense of exposing the fraud."[2]

It may not be inapt here to recall our own experience in Massachusetts where in equity admittedly our courts have always had power to award attorney fees of a party taxed as "costs between solicitor and client" against the losing party. Even in outrageous cases where the court has found that the litigation was fraudulent or vexatious, or where a defense without merit has been pronounced dishonest, our courts have almost consistently refused to allow such attorney fees to be so taxed as costs.

In bills for construction of wills where our practice has awarded allowances to counsel such allowances have been so notoriously inadequate that they have often proved only a source of embarrassment to the attorneys involved. Although the courts explain that such allowance of fees to an attorney is not made as the full amount which he may be entitled to receive from his client the attorney

[1] Page 65. [2] Page 73.

has uncomfortable explanations to go through to convince his client that he is not getting two fees or that the court has not placed a value upon his services substantially lower than the attorney himself fixed.

All these evils may be considerably exaggerated by the timidity of judges in hesitating to make adequate allowances for attorneys' fees especially should a situation arise where there is public clamor about the size of attorneys' allowances out of the funds being administered by the court. Tradition attributes to Mr. Justice Holmes while a member of our Supreme Judicial Court a pronouncement that in awarding costs out of a fund he knew of no precedents in Massachusetts law for the courts to follow other than it was their duty to be "reasonably mean"—

LEE M. FRIEDMAN.

II. BLOCKING FAKE LAW SUITS.

(From the Boston Post of August 26, 1926.)

One certain way to cut down the flooding of our courts with frivolous suits and "hold up" litigation would be to provide for the payment of reasonable costs by the unsuccessful litigant.

There is no reason why a citizen, called upon to defend a suit entirely without merit and forced to expend a sizable sum in defending, should not be allowed something more than the few dollars of statutory costs.

At present an entirely innocent person can be sued on any pretext and put to all sorts of expense and trouble with the object of compelling him to make a settlement rather than face further expense in court.

The many claims against large estates made by individuals who have no shadow of a legal cause of action are invariably pressed in the hope that the executors or legal heirs will pay something to be rid of court proceedings.

But if a prospective litigant knew that he would be forced to pay several hundred dollars in costs unless he prevailed in the suit he would be cautious about putting forward a frivolous claim.

There is no reason why reasonable attorney's fees should not be allowed in the bill of costs. They are as legitimate as the sheriff's fees which are now allowed. If a defendant is obliged to pay his attorney $500 for defending a suit then that charge or a reasonable portion of it should be paid by the plaintiff who ventures upon a court action without merit.

If the judges could be empowered to award a defendant a sizable and adequate proportion of the actual expenses he incurs in defending an unjust law suit we should have very few of these "fake" law suits.

At least 25 per cent of all law suits actually brought ought never to take up the time of the courts.

Authority given to the judges to fix costs according to actual expenditures would give us more real justice. No honest litigant need have any fear of such a provision.

But the crooked litigant, the legal "hold up man" and the pestiferous person with an obsession for litigation would find it unprofitable to pursue their vocation.

III. Note.

The views of the Judicial Council to which Mr. Friedman refers may be briefly paraphrased by the statement that justice is made more expensive than it ought to be in Massachusetts because litigation is made so cheap. It is common knowledge that there are many unnecessary and unwarranted suits and defences and appeals. This is a condition to be faced. The Judicial Council is trying to think out some reasonable plan to be fitted into Massachusetts practice which will avoid the results mentioned by Sir John Hollams and at the same time do something to discourage the "fake" litigation referred to in the *Post* editorial. It is not an easy problem to deal with but it is one which the public may fairly expect the bar to think about. The responsibility for groundless litigation rests largely with members of the bar who forget both the fact and the meaning of the oath which they take when they are admitted to practice. That oath, which is required by G. L., Ch. 221, §38, reads,

> "I solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as to my clients. So help me God."

That oath is not a mere formality. It is a condensed code of professional conduct which has come down as a traditional standard from the early days of the profession in Massachusetts. But, like

the Decalogue, it is not always easy for individuals to live up to. If laymen would take a more active interest in persuading the legislature to assist in raising the present low standards of training for admission to the bar so that many lawyers would have a background of more respect for their own profession, it would gradually do more than anything else to reduce the amount of "fake" litigation. Meanwhile, we must experiment as well as we can with less effective methods which may accomplish something although they will not bring on the millennium.

F. W. G.

PROFESSOR SUNDERLAND ON UNIFORM STATE JUDICIAL PROCEDURE.

A Suggestion to the National Conference of Commissioners on Uniform State Laws.

The following passage appears in an article on "The English Struggle for Procedural Reform" in the *Harvard Law Review* for April, 1926.

"The judicial decentralization based upon the independence of our state governments develops a definite interstate competition in procedural law. All our states have similar judicial problems which are met in different ways. Successes in one state are imitated in others, failures are avoided. The probability of the accidental emergence of an improvement in procedure is multiplied by forty-eight, and once having appeared in any state it becomes an object of interest in all the rest. Although there can be no competition among individual lawyers, we have a very effective competition among systems and rules of practice. The whole country is a laboratory in which experiments are being actively conducted. Nothing can halt this stimulating process except the standardizing of procedure through uniform state legislation. It is sincerely to be hoped that this movement will not extend into the procedural field. It will destroy the most promising possibility for the general improvement of American procedure. Court practice, says the Judicial Council of Massachusetts in a recent report, is peculiarly a subject for local experiments in convenience and effectiveness and the states should not be hampered by uniform laws." *

* First Report, 35 (Nov., 1925).

THE PROPOSED UNIFORM MORTGAGE ACT

Correspondence with the Chairman of the Committee of the National Conference on Uniform State Laws

Minneapolis, Minn., April 7, 1926.

The Editor, Massachusetts Law Quarterly,

Dear Sir:

We invite your attention to a Uniform Mortgage Act for adoption by all of the states. We enclose a copy for your consideration to discuss in the Massachusetts Law Quarterly.

The Act has a double purpose: to standardize mortgages in the states, which would facilitate the loaning of money, and tend to reduce interest rates; and to provide progressive legislation to simplify mortgages and their foreclosure and to make clearer titles to land. The short form mortgage will alone greatly reduce records in the recording offices (p. 3, 9). The foreclosure by power of sale with right of redemption, gives a less expensive, simpler method of foreclosure than by suit in court now prevalent in the United States (pp. 5–7). It is estimated that the passage of this Act generally in the United States would save many millions of dollars every year.

You will note on pages 7, 8, 14 and 15 of the enclosed pamphlet, that Prof. Campbell of Harvard, Prof. Durfee of Michigan and Prof. Low of Columbia have considered the matter of sufficient importance to treat it at length, and that articles have been published in the *Michigan Law Review* and *Harvard Law Review*. Also Mr. Ewing, attorney for the Metropolitan Life Insurance Company, has written an extensive paper on the act (p. 8, 9). The matter has had the consideration and approval of the American Title Association, National Association of Real Estate Boards and others (p. 9, 10, 12, 64).

The several reports of the Mortgage Committee on this subject, referred to in the enclosed (p. 2, 63), constitute the only constructive work for statutory improvement of mortgage law that can be found in the country. This Act is necessary to the proper consideration of the subject of mortgages in the United States.

We should be glad of your constructive or destructive criticism of the Act, and request a copy of anything you may publish. You may be interested to compare the within Act with your present state law and note the changes and effect it would produce.

Yours truly,

S. R. Child,

Chairman, Committee on Uniform Mortgage Act.

JUNE 25, 1926.

S. R. CHILDS, Esq., Lumber Exchange, Minneapolis, Minn.

DEAR MR. CHILDS:

On April 7, you wrote me enclosing copy of the proposed uniform mortgage act and asked for constructive or destructive criticism of the act in the MASSACHUSETTS LAW QUARTERLY.

I sent your letter with copy of the act to one of our men who is most actively engaged in dealing with Massachusetts law of real estate and asked for his comments. I enclose copy of his views, the substance of which I am planning to print together with your letter in the August number of the MASSACHUSETTS LAW QUARTERLY with perhaps some additional comments of my own along the following lines.

Without intending to disparage the work of the National Conference on Uniform State Laws, I feel very strongly that the conference makes a serious mistake in undertaking to prepare "uniform laws" on *some* subjects to be urged on the states. There are some subjects on which uniform laws may be useful and in the line of progress. There are other subjects which, in my opinion, are outside the field of the conference because uniform laws are neither desirable nor in the line of progress. When the conference enters on this field, I think it should distinctly limit its work to the preparation of what it considers a "model" act as a suggestion for those states in which such an act might be considered an improvement because of local conditions.

I believe that the uniform mortgage law falls within this class and that it would be a mistake for the conference to urge this law for all the states. I appreciate the force of some of the things which you say in your letter and I have no doubt that this proposed law would be a good thing in a number of states, perhaps in the west or middle west or south, but I believe that the law of real estate is a matter for local legislation and should remain so. This is peculiarly true in Massachusetts, in which the land law has grown up during a period of three hundred years. In the same way, I think the conference was mistaken in recommending some years ago a uniform land registration act and the fate of that act, if I understand it correctly, has justified my comment. At all events, nobody ever paid any attention to it is Massachusetts and I do not think they ever will. We established our Land Court here in 1898 under a very carefully-drawn act prepared by Alfred Hemenway, Esq., as sole commissioner at the request of the legislature. It was fitted into Massachusetts conditions and the development of the Land Court practice since 1898 has been one of the constructive pieces of judicial work of the past quarter of a century. The National Conference on Uniform Laws is not adapted in my opinion to reorganizing our Massachusetts system of land law and they are wasting their time when they try to do so. The

same is true in regard to your proposed mortgage law in my opinion. We do not want this mortgage law in Massachusetts.

We shortened almost all our forms of deeds, including mortgages, etc., in 1912, omitting most of the language. I think our mortgage forms are shorter than anything which you suggest as far as that detail is concerned. I served on the committee of the Massachusetts Conveyancers Association which drafted the act so that I am familiar with the shortening process.

Another subject which I think is outside of the field of the uniform law conference is judicial procedure. I do not believe in uniform judicial procedure for all the states. I think it would be a serious step backwards. It is a subject which is, and should remain one, for local experiment in prompt effectiveness. Accordingly, I have always opposed the uniform declaratory judgments act when presented here in Massachusetts. The Judicial Council of Massachusetts, which considered the subject last year, unanimously agreed in the following statement:

> "The Council believes attempts to make court procedure uniform in all the states to be a mistaken one which is likely to obstruct progress. Court procedure seems to us peculiarly a subject for local experiments in convenience and effectiveness."

As you may wish to have a statement of these views and the enclosed discussion before the annual meeting of the conference next month, I am sending this to you in its present form for your information. I trust that the conference, if and when it enters these fields of peculiarly local matters, will confine its recommendations to suggested "model" acts because there are many subjects in which the attempt to reduce everything to the dead level of uniformity would cause stagnation instead of advance through local experiment which always has been the path of legal advance in many subjects.

Yours very truly,

F. W. GRINNELL.

COMMENTS ON PROPOSED UNIFORM MORTGAGE LAW BY A LAND LAWYER

Referred to in the foregoing letter.

The law of Massachusetts affecting the title to land has been built up through a development of the common law for a period of nearly 300 years, and is governed by decisions to be found in every one of our 252 volumes of reports. So far as modified by legislation the statutes have developed almost along the lines of the common law, and have been interpreted in innumerable decisions by the court of last resort. In addition to this, customs, having almost the force of law, and much more tenaciously held by people who

are actually engaged in real estate transactions than are the rules of law themselves, are firmly implanted in practice. Moreover, Massachusetts law, in regard to important features of the law of real property, is peculiar to itself; for example, as to such matters as base fees, vested interests in contingent remainders, estates by the entirety and, particularly, mortgages. Our congested records, and the habit peculiar to the metropolitan district of dealing with land as a purely impersonal thing through the use of straw-men, make this state a field peculiarly unsuited to the introduction of uniform laws however salutary they may be for new and simpler communities. Our land registration act is wholly unlike the uniform land registration act. It was originally drawn, and has been consistently developed, to meet local conditions in Massachusetts, to be operated in accordance with local methods of dealing with title to land, and through the machinery of a special court. The Uniform Mortgage Act is an admirable thing where it can be used. It could not be used in Massachusetts.

That Act starts off by making a mortgage a lien upon, instead of an estate in, the premises. This would absolutely revolutionize the law in Massachusetts. Our law in relation to mortgages is not satisfactory. Perhaps it should be changed. I am inclined to think that it should.

But, in changing it, regard must be had to the customs that have grown up, and to the statutes and decisions relating to our mortgage forms, covering a very long series of years. If Mr. Child will look over Crocker's Notes on Common Forms, now a volume of 746 pages with a new and larger edition in preparation, he will understand this situation.

The next provision is for a substantial period of redemption after foreclosure sale. This is contrary to all of our methods, and would be opposed by every mortgagee.

The next provision requires notice of foreclosure to all interested parties. Our decisions and our statutes leave a mortgagee unhampered by anything that may be subsequently done by an owner of the equity. A change in this would be bitterly opposed. Such a provision is of course essential where the mortgage is a mere lien. Our whole procedure rests on the fact that with us a mortgage, unless discharged is a deed absolute.

The provisions for foreclosure by sale and for short forms are admirable in themselves and are, as the commissioners point out, a great improvement over methods that prevail in states that do not have them. But we have both, our practice and procedure under both is settled, and the decisions governing them are numerous.

The provision in regard to "record owner of the mortgage" (Sec. 1) would upset our practice and innumerable decisions. We follow the debt and not the record title to the mortgage. Our method is, I believe, a sound one, although I admit that it is nowhere near as convenient.

The same objection applies to the provisions freeing a mortgage securing a negotiable instrument from defences (Sec. 6).

The provision in regard to the necessity for recording a power of attorney by an agent (Sec. 14) is an admirable one in drafting a new law for a new community but it would unsettle a great many foreclosures if adopted in Massachusetts. Of course it could be done, but I think the effect of the remedy would be worse than the cure.

The provision as to publication of notice of sale (Sec. 16) is too long for our purposes here. There would be great opposition to it.

The provision for fees (Sec. 22) is not suitable for Massachusetts. Such matters are much better left out of a statute as far as we are concerned, because fees differ radically in different parts of the state. There is as much difference between fees paid in the country districts and those paid in Boston for similar services, as there is between fees paid in Boston and those paid in New York for similar services.

The provisions for redemption (Sec. 25) I have already commented on. We do not have sheriffs' sales, and no one would take mortgage loans in Massachusetts with any such periods of redemption as are noted under Sec. 25.

The period for limitation of action would, as a practical matter, leave every sale questionable until the period had expired. With us the matter is one for equity, and the rules are well settled under a long line of decisions.

I guess that I have given you material enough and to spare. If you have any other questions, however, do not hesitate to call on me.

I believe in uniform laws in their proper field. I am not opposed to radical changes where they can satisfactorily be made. Our Land Court registration system might have worked very radical changes and with very disastrous results. It has not been so administered, because the only way in which it would be administered at all to secure the reforms that we need was to obtain the co-operation, and to meet the needs, of the people who deal with the title to land without necessitating their changing deep-rooted prejudices and habits. Legislation that attempts that is futile whether it be in the form of a Uniform Mortgage Act or a Volstead law.

At a recent meeting of the Massachusetts Association of Real Estate Boards as reported in the *Boston Transcript* of Oct. 21, 1926, the following resolution was adopted:

"An adequate supply of money for mortgages at fair rates is a prime requisite in the development of real estate and the purchase of homes. As a very large proportion of mortgages fulfill their contracts, the vast majority of borrowers are benefitted by

laws which provide certain and expeditious protection for the lender in case of default because such protection increases the supply of money for mortgages and lowers the rates. Borrowers in Massachusetts have the benefit of this protection to lenders, while in many States mortgage foreclosure laws, while seeming to favor the mortgagor by making foreclosure burdensome, reduce the supply of mortgage money and raise the rates.

"Whereas, The commissioners on uniform State laws have recommended a uniform foreclosure law for adoption by the several States providing for court proceedings and for a period of redemption after foreclosure it is

"Resolved, That any such law in Massachusetts would be detrimental to the great majority of mortgagees and mortgagors and injurious to the real estate business and the savings banks of Massachusetts; that the Massachusetts Association of Real Estate Boards is opposed to the proposed legislation and recommends to its member boards that they oppose it before the Legislature if occasion arises."

TAKING THE COURT'S TIME.

(From the Boston Transcript of Sept. 25, 1926.)

To the Editor of the Transcript:

The intimation from Judge Murray that those who knew themselves guilty of illegal parking who pleaded not guilty and compelled the court to try the cases and were convicted might have to pay larger fines than were required from those who pleaded guilty, was a reasonable one. They took the time of the court, compelled the attendance of witnesses, and caused other large court expenses.

His refusal to accept pleas of "nolo" in such cases also was reasonable. Such a plea was a ruse to escape a "record," and there was no basis for the attempt by saying he was unwilling to contend with the Government.

Of course an accused man is entitled to a trial if he wants it but he has no right to insist upon a trial and the testimony of witnesses when he knows that the facts are all against him. To compel the Government "to prove it" is mere obstinacy, not to be encouraged.

I am reminded of a more important incident of the same kind.

A vacancy in the district attorneyship of a large district (not Suffolk) was filled by the appointment of an able lawyer, who had never taken criminal cases, and was not well known by lawyers who did. (He himself told me the story.) The lawyers of the

district saw it as an opportunity to test his capacity as a prosecutor before a jury. They insisted upon trying almost every important case, and some unimportant ones. He proved equal to the demands of the situation—more than a match for his challengers.

When the next criminal term opened, he called them together and told them what he expected. His little speech was substantially as follows: At the last sitting of the court I was almost a stranger to you. You agreed together to try your cases, in order to get my measure. I have no fault to find. It was your right. There is no need, I take it, for further tests for that purpose.

Now let us have an understanding before we begin work. If any lawyer has a case in which he thinks his client is innocent, or in which he thinks he has fair grounds for a contest, it is his duty to his client to try the case. But if, in a case which is "a dead open-and-shut" against him, you insist upon a jury trial, on the bare possibility that you may get a verdict or hang the jury, in case of a conviction, I shall call the attention of the court to that fact, in connection with the fixing of the punishment.

The lawyers "took notice," and thenceforth there were few trials, and that fact, instead of the other, weighed with the court in its sentences.

I wonder if this sort of thing should be considered in cases of appeals to the Superior Court. There were more than 10,000 of them last year! Nominally each of the appellants wanted a jury trial. That is the basis of an appeal. But in the Superior Court only about one in twelve asks for one. An appeal is very expensive to the county. Why should not the one who takes one, for any other purpose than to secure the determination of his guilt by a jury of his peers, sometimes have its cost considered in fixing his punishment?

WARREN F. SPALDING.

BOSTON, Sept. 24.

A FEW HISTORICAL REMINDERS AS TO THE IMPORTANCE OF THE RIGHT OF FREE SPEECH.

The recent discussions in the press in which the Mayor of Boston and others have taken part, as to free speech and the use of the Old South Meeting House and other halls in Boston and elsewhere, for speech which some people think is too "free", suggests that a few historical reminders may be timely in order to give us a better perspective in regard to the discussion.

It is a perfectly natural feeling of any of us if we happen to be bored or annoyed or very much irritated by somebody whom we think is talking like a fool, or worse, to feel that we should like to have him muzzled. It was a similar feeling of people about the use, or abuse, of liquor which led to the passage of the 18th amendment and the Volstead Act. Some people would doubtless like to suppress liquor as a topic of conversation and oratory to-day, but the history of our liberties shows that our own freedom from unreasonable interference involves self-restraint in regard to interference with others.

At the time of the Alien and Sedition Acts in the administration of John Adams, the Federalists were obsessed with apprehensions of the results of talk. They made a mess of things by the acts of congress referred to and the judicial administration of it. A somewhat similar state of mind existed among many people recently during the World War and led to somewhat similar results. Such situations are almost inevitable during a war as far as human experience shows, but there always has been some one in our history who has had the courage of his convictions and has spoken out in defence of principles of free speech when it was not popular to do so. Whether or not we agree with all his views, Professor Chafee is entitled to our respect for being one of these men who had the courage to remind us that some of us were getting too apprehensive and were perhaps making fools of ourselves in consequence, even though some of us may have thought that Professor Chafee himself was the fool. Now that we have cooled off a little, some of us can afford to smile at ourselves for getting so excited over Chafee's writings when they were just the sort of thing that was needed from somebody to check the progress of the prevalent disease.

It is well to remember that the American people had a silly season during and after the French Revolution period and that so

intelligent a man as Fisher Ames died in 1808 obsessed with fears that the excesses of the French Revolution would appear on this side of the Atlantic and that his children must look forward to "their future servitude to the French," (See Henry Adams' "History of the United States," I, 83). One of those children, however—Seth Ames—lived to be the Chief Justice of the Superior Court and later a justice of the Supreme Judicial Court of Massachusetts in spite of all the nonsense that has been talked in this country since 1800.

Of course, there are practical limits to "free speech" within the "rule of reason" of any government and in this connection we refer those interested to the note on "The Limits of Legal Toleration" in the *Harvard Law Review* for January, 1920, p. ??, which was reprinted in the MASSACHUSETTS LAW QUARTERLY for May, 1925, p. 54. By way of illustration of the foregoing remarks, we call attention to the following:

F. W. G.

THE HISTORICAL REMINDERS

I.

In a letter, which was widely quoted in 1920, Mr. Justice Holmes said,

> "With effervescing opinions, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air."

Hyde Park corner in London is sometimes referred to by wise men as a "remarkable safety valve."

II. *"John Wilkes".*

> "In his person though he were the worst of men, I contend for the safety and security of the best."—*Lord Chatham.*

" 'That name,' says Trevelyan, 'which was seldom out of the mouths of our great-grandfathers for three weeks together, had been stained and blotted from the first.' A rake and a prodigal, unfaithful to the wife whose fortune he looted for use in election briberies, lacking in genuine devotion to any political ideal, he nevertheless by sheer pluck and impudence led the fight to establish in the law of all English-speaking countries five great principles of freedom; the immunity of political criticism from prosecution; the publicity of legislative debates; the abolition of outlawry, which condemned a man in his absence; the protection of house and property from unreasonable searches and seizures; and the right of a duly elected representative of a constituency to sit

in the legislature unless disqualified by law, no matter what personal objections his colleagues may have to his opinions and writings or to his previous convictions for sedition. So great were his achievements that he became a household word on this side of the Atlantic. One of the largest cities in Pennsylvania is named for him. Men called their children after him. One New England admirer had three sons, Wilkes, Pitt, and Liberty. In the eyes of our forefathers he was the most conspicuous combatant against the doctrine, so obnoxious to them, that men might be maltreated, imprisoned, exiled, disfranchised for the supposedly evil tendencies of their political opinions." (Chaffee, "Freedom of Speech," 295.)

III. *From Bishop Burnet's "History of His Own Time," Vol. III, p. 39.*

In speaking of the reign of James II:

"The courtiers were projecting many laws to ruin all who opposed their designs. The most important of these was an act declaring treasons during that reign, by which words were to be made treason. And the clause was so drawn, that any thing said to disparage the king's person or government was made treason; within which every thing said to the dishonour of the king's religion would have been comprehended, as judges and juries were then modelled. This was chiefly opposed by Sergeant Maynard, who in a very grave speech laid open the inconvenience of making words treason: they were often ill heard and ill understood, and were apt to be misrecited by a very small variation: men in passion or in drink might say things they never intended: therefore he hoped they would keep to the law of the twenty-fifth of Edward the third, by which an overt act was made the necessary proof of ill intentions. And when others insisted, that *out of the abundance of the heart the mouth spake,* he brought the instance of our Saviour's words, *Destroy this temple;* and shewed how near *the temple* was to *this temple,* pronouncing it in Syriac, so that the difference was almost imperceptible. There was nothing more innocent than these words, as our Saviour meant and spoke them: but nothing was more criminal than the setting on a multitude to destroy the temple. This made some impression at that time.* But if the duke of Monmouth's landing had not brought the session to an early conclusion, that, and everything else which the officious courtiers were projecting, would have certainly passed." **

"*(The title of the intended act was, 'A bill for the preservation of the person and government of his gracious majesty King James the second.' See Rose's Observations on Fox, p. 157, and Heyward's Vindication, p. 218–234; where, p. 231, lord Lonsdale's Memoir of the reign of James II. is cited, in which sergeant Maynard's argument is expressly noticed; and the accuracy of bishop Burnet is thus maintained against Mr. Rose's doubts.)

**(Lord Lonsdale, in his unpublished Memoir just mentioned, reports, p. 9, that there were two provisos agreed on in a committee; the one was, that no preaching or teaching against the errors of Rome in defence of the protestant religion should be construed to be within that act. The second was, that all informations within that statute should be made within forty-eight hours. With these two provisos, it is added, the force of it was so mutilated, that it was not thought worth having, and so it died.)"

IV. *"Lord Justice Scrutton."*

(From the Boston Herald of June ??, 1926.)

"Recently before the English courts in the well-known case of Art O'Brien and other alleged Irish seditionists Lord Justice Scrutton, one of the great contemporary English judges, thus opened the judgment in which he rebuked executive encroachments on liberty:

"This appeal raises questions of great importance regarding the liberty of the subject, a matter on which English law is anxiously careful, and which English judges are keen to uphold. As Lord Herschell says in Cox v. Hakes: 'The law of this country has been very jealous of any infringement of personal liberty.' This care is not to be exercised less vigilantly because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison."

A GENIAL SIDE-LIGHT ON LEGAL HISTORY

T. Noon Talfourd, Serjeant-at-law, member of Parliament, and essayist, was one of the literary lawyers of the early 19th century. In turning over the pages of a volume of his miscellaneous writings in an old bookstore recently, the Editor happened on the following passage at the end of an essay on Lord Eldon and Lord Stowell. It presents a genial sidelight on legal history which is worthy of rescue from forgotten pages in these days.

John and William Scott, the two sons of a coal-fitter of Newcastle, rose to the head of the legal profession; John, as Lord Eldon the Chancellor for many years, William, as Lord Stowell, the great admiralty judge of the Napoleonic Wars. Serjeant Talfourd says of them:

> "If, however, these great lawyers were not prodigal of extensive entertainments, they loved good cheer themselves, and delighted to believe that it was enjoyed by others. Whether the statement be true, which the genial biographer of Lord Stowell in the *Law Magazine* makes, 'That he would often take the refection of the Middle Temple Hall by way of whet for the eight o'clock banquet,' we will not venture to assert; but we well remember, more than thirty years ago, the benignant smile which Sir William Scott would cast on the students rising in the dim light of their glorious hall,

as he passed out from the dinner table to his wine in the parliament chamber; his faded dress and tattered silk gown set off by his innate air of elegance; and his fine pale features beaming with a serene satisfaction which bumpers might heighten but could not disturb. He and Lord Eldon perfectly agreed in one great taste—if a noble thirst should be called by so finical a name—an attachment to port wine, strong, almost as that to constitution and crown; and, indeed, a modification of the same sentiment. Sir William Scott may possibly in his lighter moods have dallied with the innocence of claret—or, in excess of the gallantry for which he was famed, have crowned a compliment to a fair listener with a glass of champagne—but, in his sedater hours, he stood fast by the port, which was the daily refreshment of Lord Eldon for a large segment of a century. It is, indeed, the proper beverage of a great lawyer—that by the strength of which Blackstone wrote his Commentaries—and Sir William Grant meditated his judgments—and Lord Eldon repaired the ravages of study, and withstood the shocks of party and of time. This sustaining tranquilizing power, is the true cement of various labours, and prompter of great thoughts. Champagne, and hock, and claret, may animate the glittering superficial course of a *Nisi Prius* leader—though Erskine used to share his daily bottle of port with his wife and children, and complain, as his family increased, of the diminution of his residue—but port only can harmonize with the noble simplicity of ancient law, or assuage the fervour of a great intellectual triumph. Each of the Scotts, to a very late period of his old age, was true to the generous liquor, and renewed in it the pastimes of youth and the crowding memories of life-long labour. It is related of Lord Stowell, that a short time before his death, having, in the deepening twilight of his powers, submitted to a less genial regimen, on a visit from his brother he resumed his glass; and, as he quaffed, the light of early days flashed upon his overwrought brain—its inner chamber was irradiated with its ancient splendour—and he told old stories with all that exquisite felicity which had once charmed young and old, the care-worn and the fair—and talked of old friends and old times with more than the happiness of middle age."

MORE ABOUT THE NEED OF LEGISLATION TO REQUIRE THE OFFICIAL TABULATION OF THE BLANK BALLOTS CAST UPON QUESTIONS SUBMITTED TO THE VOTERS

A bill to provide for such tabulation was submitted to the legislature in 1925 and again this year for reasons which were explained in the QUARTERLY for August, 1925, pp. 82–87. Little attention was paid to it and the Committee on Election Laws reported adversely in each year. The bill will be introduced again at the next session and we call attention again to the importance of the subject. For political purposes, we are generally told that "we, the people" and *all* the "people" clearly speak through a majority of the voting "people", even though it is really a small majority of the small minority of the voters who take the trouble to vote on men or measures on election day in nasty weather. Many of us thoughtlessly swallow this "fiction" whole.

Now that we have the I. and R. and the "Public Opinion" act in the legislative districts, and the growing practice of *advisory* voting on a state-wide scale, for the *information*, which is often translated for political purposes into the idea of *instruction*, for legislators this "fiction" is becoming more and more threatening to the stability of government and the protection of the rights of individuals and minorities on which our American national character rests.

Under these circumstances, "the wisdom of government" lies in providing all practicable means of informing the representatives and *voting* "people" *conveniently* about the *facts* of government as an antidote for the "fictions" that are fed to them. It is no answer to say that people can do the arithmetic and work out the number of blank ballots themselves from the "yes" and "no" tables. We all know that they don't and won't do that. The arithmetic should be officially done and three official tables of "yes" votes, "no" votes and blanks published for each district on each question, so that the press can and will naturally and conveniently report all the facts instead of giving us the garbled facts that we get now, because the real facts are not made easily available. Any well regulated business would remedy this situation but the legislature thus far has taken no interest in it. F. W. G.

Note.

Mr. Howie's account, elsewhere in this number, of the methods of collecting signatures adds emphasis to the need referred to above.

TAXING DONEE ON GAIN OVER COST TO DONOR HELD ILLEGAL

The character of this provision of the Federal income tax law was discussed in the MASSACHUSETTS LAW QUARTERLY for February, 1925, pages 75–77, and the opinion expressed that the provision taxing the donee on the gain above the cost to the donor was invalid and that, "the only legal basis for figuring gain or loss and computing the income tax of the donee is the value of the property at the time the donee received it."

We are interested to see a similar result reached in the following opinion.

OPINION OF JUDGE KNOX OF THE FEDERAL COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN TAFT v. BOWERS

"It is my opinion that no part or portion of the value of an outright bona fide gift as of the date of delivery is, or can, constitute taxable income in the hands of the donee. So far as the latter is concerned, the gift is a capital transaction. His liability for future income therefrom must be based on the value of the gift as of the time the transaction is complete, and not upon the cost of the property at the date of its acquisition by the donor. If the construction of the tax law, for which the Government contends, should be applied, it means that the donee of property is to be taxed upon an increment in value which, if it can be regarded as income at all, is income to another, viz: the donor. A tax levied upon that increment in the hands of the donee necessarily results in a direct levy upon the gift. If the gift consisted of money, would it be argued that the donee is to be taxed on the difference in value of the money, that is, its purchasing power, as between the date of its acquisition by the donor, and the date of its delivery to the donee? I think not. The money would be regarded as capital in the hands of the donee; and so, I think that that which may be converted into money, as of the date upon which it is given away, must, so far as the donee is concerned, also be regarded as capital.

According to my views, the 16th Amendment to the Constitution conferred no power upon the Congress to tax gifts.

Very likely, it is possible to devise reasonably plausible arguments to the effect that what is transferred by the donor is nothing more than his original investment therein, and to cite various decisions which contain expressions that may be tortured to support the argument; but the fact remains that the common understanding of a gift that the donee acquires, absolutely and completely, the entire value of the donation as of the date of transfer. Until a

higher court than this is willing to endorse a different principle, I certainly shall not do so.

The motion to dismiss the complaint is denied and the plaintiffs may have judgment for the claim asserted against the Collector. He, of course, will be granted a certificate."

AUGUST 5, 1926.

THE FEDERAL GIFT TAX HELD UNCONSTITUTIONAL.

The validity of the gift tax was discussed in the MASSACHUSETTS LAW QUARTERLY, for May, 1924, pp. 78–83. In February, 1926, the question was passed on by two Federal district courts about simultaneously and in opposite ways. On February 15, Judge A. N. Hand held the act unconstitutional. On February 17, Judge Raymond of the Western District of Michigan, sustained the tax in an opinion which is too long to reprint. It will be found in *Blodgett* v. *Holden,* 11 Fed. Rep. 2nd Series 180–190. After considerable introduction, the following sentences from Judge Raymond's opinion show the conclusion that "the gift tax" is not imposed because of "general ownership of property"; that it "is imposed only after the actual transfer"; that "the subjective or passive right to make a gift of property is not taxed. It is the active or objective exercise of the right which is taxed," and that

> "It is undoubtedly true that, if the tax were upon the bonds, or upon the right to transfer the bonds by sale or gift, it would be a tax upon personal property, and would be unconstitutional. It seems clear, however, that the tax in question is not a tax upon the bonds, nor upon any of the incidents of ownership arising from their ownership. All the incidents of ownership have ceased before the right to tax attaches. It is clearly a tax upon the transmission or transfer itself, not on property, and under all of the authorities up to the present time such taxes have been determined to be not direct, but excise taxes, and hence are not within the constitutional inhibition."

Since a gift tax on a donor is a tax on reduction, one is led to ask whether Judge Raymond would support a tax on losses "imposed only after the actual loss" and not imposed on "the subjective or passive right" to lose, but on "the active or objective exercise of the right to lose"?

By way of contrast, as Judge Hand's opinion holding the gift tax invalid is brief, we reprint it in full.

F. W. G.

OPINION OF JUDGE A. M. HAND OF THE FEDERAL COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN McNEIR v. ANDERSON 10 FED. 2ND SERIES, 813.

Augustus N. Hand, District Judge (after stating the facts). The gift tax was imposed under section 319 of the Revenue Act of 1924 (Comp. St. Supp. 1925, §6336 4/5s), which provides that:

"For the calendar year 1924, and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly. * * * "

I shall not discuss whether the gift tax is unconstitutional or inapplicable, because applied retroactively, or because not uniform throughout the United States, or because the classification is unreasonable. If the tax be held a direct tax, which must be apportioned among the several states, as I believe it must be, it will be unnecessary to consider the other objections which the plaintiff has raised.

There is, I believe, no case where such a tax as the one now under consideration has been regarded as a tax upon an excise or privilege. Moreover, so far as I can discover, it is a form of taxation now both in America and Europe. Testamentary gifts and gifts in contemplation of death have been, both in England and the United States, treated as excises, and subject to taxation upon that theory. If there is anything left of the general views of the court in *Pollack* v. *Farmers' Loan & Trust Co.*, 15 S. Ct. 912, 158 U. S. 601, 39 L. Ed. 1108, as to the nature of so-called direct taxes, the tax upon a gift not made in contemplation of death, and not to take effect upon death, would seem to be necessarily a direct tax imposed upon the donor purely as the owner of property.

Billings v. *United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, is not in point, for the *use* of a yacht for pleasure was not only distinguished by the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable. The laws for regulative provisions appear to place such property peculiarly within governmental control and regulation, so that the subjection of the use of it to an excise tax cannot be regarded as extraordinary.

The case of *Patton* v. *Brady*, 22 S. Ct. 493, 184 U. S. 608, 46 L. Ed. 713, is also not in point. There a tax was imposed upon tobacco manufactured for consumption, at a period intermediate the commencement of manufacture and the final consumption of the article. Such a tax had been applied to tobacco in England prior to the adoption of the Constitution, and was held by the Supreme Court to have come within the definition of an excise tax.

The government cites the language of Mr. Justice Lamar in *Keeney* v. *New York*, 32 S. Ct. 105, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139, where a statute of New York providing for a transfer tax upon property passing by deed of a resident, and intended to take effect in possession or enjoyment at or after the death of the grantor, is discussed. In that case the testatrix, Mrs. Keeney, four years before her death, had conveyed certain property to trustees, in trust to divide the net income between herself and her three children during the term of her life, and upon her death to transfer the principal to her children, or their issue. The argument was made that the case was different from one where property was transferred in contemplation of death, because there was no such contemplation, that a gift made *inter vivos*, to take effect upon death, was not within the transfers which could be taxed by the state as a privilege, and that the tax, therefore, was subject to the ordinary limitations of a property tax. Mr. Justice Lamar, in upholding the tax, said:

"But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever."

He went on to say that the Internal Revenue Act of 1864 "imposed a succession tax on 'all dispositions of real estate, taking effect upon the death of any person'," and cited the case of *Scholey* v. *Rew*, 23 Wall, 331, at page 347, 23 L. Ed. 99. This remark about the effect of the Internal Revenue Act of 1864 (13 Stat. 287), and the suggestion that it extended to transfers inter vivos, to take effect on the death of persons other than the grantor, was made in arguendo, and was unnecessary to the disposition of the Keeney Case.

Certainly the case of *Scholey* v. *Rew*, supra, involved no such interpretation, but, whether or not such can be regarded as the proper construction of the Internal Revenue Act of 1864, there may well be a difference in classification between a tax upon a transfer of property upon the death of a person, whether he be the grantor or a third person, and the taxing of a gift inter vivos at a time when it is entirely unconnected with any devolution of property by death.

The question involved in the present case does not resemble that considered in the Keeney Case, for there the tax was upon the transfer of an estate at the time of the death of the settlor, which had been held in trust for her life use. Here it is imposed upon a transfer inter vivos, and not upon a transfer at the time of the death of any one.

The tax under consideration seems to have no more warrant than that before the Supreme Court in the recent case of *Dawson* v. *Kentucky Distilleries,* 41 S. Ct. 272, 255 U. S. 288, 65 L. Ed. 638. There the tax was described as a license tax of persons engaged in the business of owning and storing whiskey in bonded warehouses. The Supreme Court, however, held that the tax was really one on the right to take possession and remove whiskey from a bonded warehouse, and was a direct tax upon property and not upon an occupation or license. Mr. Justice Brandeis said in the opinion: "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

In *New York Trust Co.* v. *Eisner,* 41 S. Ct. 507, 256 U. S. at page 349, 65 L. Ed. 963, 16 A. L. R. 660, Mr. Justice Holmes mentioned the argument that the federal estate tax, if treated as levied upon the transfer of the decedent's estate on his death, would be direct, and therefore void, for want of apportionment, and said: "But that matter * * * is disposed of by *Knowlton* v. *Moore,* not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' [20 S. Ct. 747] 178 U. S. 81–83 [44 L. Ed. 969]. Upon this point a page of history is worth a volume of logic."

The fact is that there is no "page of history," or even line of history, where such a tax as this has been ever foreshadowed, and if the reasoning of *Pollock* v. *Farmers' Loan & Trust Co.,* supra, is to stand, I cannot see how this tax can be defended, which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property, which has not been apportioned, and is therefore forbidden, by article 1, section 2, clause 3, of the federal Constitution. The classification of subjects of taxation is not scientific, but largely historical, and a tax upon an ordinary transfer of personal property inter vivos, unconnected with the conduct of any business, would seem to be a direct tax, if anything can be, under judicial definitions. See *Pollock* v. *Farmers' Loan & Trust Co.,* supra, *Nicol* v. *Ames,* 19 S. Ct. 522, 173 U. S. 509, 43 L. Ed. 786, and *Dawson* v. *Kentucky Distilleries,* supra.

The motion by the collector to dismiss the complaint is accordingly denied.

THE SUFFOLK COUNTY COURT HOUSE PROBLEM

Most of the litigation in the Commonwealth takes place in the Suffolk court house. The building is of state-wide importance. The report of the special commission, appointed under Resolve Chap. 18 of 1925 for the purpose of studying and investigating the present "accommodations and needs and probable future needs" of the various courts, record offices, etc., using the present building, was reprinted in the QUARTERLY for January, 1926. The Committee on Counties reported in favor of one suggestion of the Commission for taking of a considerable area on the westerly side of Somerset St. from Ashburton Place to widened Court St. The view of the Commission in recommending this was that it would be needed in the course of 50 years, that it was now cheaper than it would be later, that it could be built on as needed, that in the meantime it would carry itself and that because of these facts it was a more economical plan than the short-sighted courthouse plans of the past 25 years or so.

The matter was then referred to the Committee on Municipal Finance which reported against this and the legislature referred the whole subject to the next legislature. A proposal was recently made before a Committee of the Boston City Council to erect a separate criminal courts building in some other part of the city. The following discussions are reprinted from the *Boston Herald* to attract attention to the subject.

(An Editorial Reprinted from the Boston Herald of August 10, 1926.)

OUR COURT HOUSE PROBLEM

All those interested in the administration of justice and in the efficient conduct of our civic affairs, indeed the whole population of the city, would do well to study the report of the special commission, headed by the Hon. Henry A. Wyman, and made up of fair-minded and level-headed men, which after hearing many persons familiar with conditions at Pemberton square and conversant with all phases of the problem, has limited its recommendations to the vicinity of the present court house. The commssion does not favor the suggestion that a criminal courts building be erected in the Park square region. The commission referred to the argument that we ought to enlarge our minds to take in the conception of "a new civic centre" in some other part of the city, and expressed on that point this judgment:

"The suggestion has not seemed to us a practicable one . . . involving as it would the abandonment of the present building and the taking of land which in all probability would be considerably more expensive, and, what is perhaps still more important, the disregard of the natural effect which the long location of the courts in this part of the city has had upon its development. . . . We believe that such a change would not be likely to meet with public favor."

On the proposal to separate the criminal courts, from the Pemberton square building, a student of the subject, reminds us pertinently of a statement made by Mr. Justice Riddell of the supreme court of Ontario, who said: "We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a busy people. We cannot afford to waste either time or money."

Now [the] point is that removal of the criminal courts away from the present site would mean a heavy waste of both time and money. Lawyers, jurors, stenographers, and all others having business with the courts, are constantly shifting from session to session and from the civil to the criminal side, and back again, to attend to cases as they are reached. The offices of a majority of the Boston bar are now within striking distance of the court house, the City Hall and the State House. That region really constitutes a kind of judicial centre. The law library is now easy of access. If it be desirable to separate the criminal and the civil sessions it seems to us to be possible to accomplish this in the immediate neighborhood of the present court house and on comparatively inexpensive land, as is suggested by the commission. The need of additional court accommodations is generally appreciated. Let us make no mistake when we come to decide the location of these supplementary accommodations.

(A Letter Reprinted from the Herald of August 11, 1926.)

OBJECTS TO COURT HOUSE PLANS

To the Editor of The Herald:

Your editorial this morning entitled "Our Court House Problem" invites immediate reply. The report of the special commission on new court house to which you invite study, was studied keenly and to good purpose by the committee on municipal finance, which resulted in the report of the commission finding a deserved lodgment in the waste basket. JOSEPH A. CONRY.

BOSTON, Aug. 10.

GOVERNOR FULLER'S PENSION VETOES.

A Turning Point in Bay State Legislation.

By E. E. Whiting.

(From the Boston Sunday Herald, June, 1926.)

These vetoes constitute a notable turning point in the history of Massachusetts legislation. They mark the turn away from the custom of legislative largess and towards the establishment of a sound principle in government, which is that public funds shall not be used for private benefit.

Some years ago Charles Warren wrote a notable paper which appeared in the *Harvard Law Review* of Dec. 25, 1898. It bore a significant and rather startling title. It was this: "Massachusetts as a Philanthropic Robber." That article attracted much attention at the time. It is still discussed. Gov. Fuller himself has referred to it. It contains eloquent citations of fact and figure indicating the extent to which the Massachusetts state government in past years has disbursed public funds under the guise of generosity in aid of private individuals, these benefits for the most part being conferred by special act of legislation.

Speaking from the viewpoint of 1898 Mr. Warren said that "few of the citizens of the state are probably aware that through the medium of the 'Resolves' the various Legislatures of Massachusetts since 1872, and especially since 1885, have appropriated as absolute gratuities, and awarded to private individuals as pure gifts, sums of money amounting to hundreds of thousands of dollars."

In spite of the warning conveyed in that article, and in spite of the incisiveness of his evidence, this custom continued practically unabated. Mr. Warren called attention specifically to the form of gratuity which "takes the shape of gifts of salaries of deceased servants of the state or of a city to their relatives."

Not only did Mr. Warren cite impressive figures indicating the extent of the material evil done, but he made quite clear the principles involved in this unjustifiable, even though well-intentioned, generosity of the Massachusetts Legislature with the public funds. He said:

"But the evil and injustice arises not so much from the amount of money so expended, as from the violation of the fundamental

principles of our government. 'The right to tax is the right to raise money by assessing the citizens for the support of the government and the use of the state.' The term 'Taxation' imports the raising of money for public use, and excludes the raising of money for private use. (*Meade* v. *Acton,* 139 Mass. 341.)

"An appropriation of money raised by taxation, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. . . . it is independent of all considerations of resulting advantage. . . . It needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken and an unjustifiable usurpation." (*Lowell* v. *Boston,* 111 Mass. 462.)

"That being the language of the Supreme Court of Massachusetts, in view of the instances given of the usurpation by the Legislature, the tax-paying citizen is certainly justified in calling the commonwealth a philanthropic robber."

In the series of veto messages sent to the Legislature during this year by Gov. Fuller, he has set forth similar principles and has applied them. If by so doing he is merely preventing isolated and individual instances of the old system's application, that would be no more than half the battle. If by reiterating in these messages the principles of the inviolability of public funds, he has broken the old well-meaning but indefensible system, that will go down as a great achievement. One veto would not have done it. A series of vetoes overridden by the Legislature would have left things about as they were. In the experience of this last legislative session, all of Gov. Fuller's vetoes of special privilege acts, with a single exception, were upheld by the Legislature. Thus we may say fairly that the Governor exerted a wise leadership in establishing a sound principle, and that he had from the Legislature a sufficient measure of co-operation to support this principle and write it in the records as an outstanding item of this year's record.

Gov. Fuller expressed a general truth concisely in his veto message dated March 30, with which he returned without his approval House Bill No. 1140 entitled, "An Act Authorizing the City of Cambridge to pension ." In that message he says this: "These payments made to living persons are simply an attempt by connivance to establish by legislation a civil pension list without the passage of any statute."

In this message also he made reference to the bad custom

which had grown up, saying: "The practise of paying these pensions has become so prevalent and the pension idea has so infected the public mind, that it may seem a bold thing to attack the custom. No amount of precedent, however, can excuse or legalize a wrong. And these payments are clearly a wrong and an injustice to the general tax-payer."

With specific references to that particular case he observed: "The beneficiary of this bill has been employed by the city of Cambridge for 48 years. How many of the citizens who pay the bills have had the good fortune to have had steady employment for almost a half century with regular pay? There are thousands of men and women throughout the commonwealth who have never had the opportunity of having steady employment year in and year out, and yet they have no pension. The tax-payers are not called upon to pay them $1000 a year in a pension. I haven't the slightest doubt that the beneficiary of this bill has given good service to the city of Cambridge, for which the prevailing wages have been paid; but in justice to the tax-payers who have to pay these special pensions, many of whom are not as financially able to contribute to a special levy as those who receive it, I cannot approve of such legislation."

On March 4 the Governor returned without his approval a bill which would have increased the salary of the clerk of the Fall River board of police from $2500 to $3000. In his message he observed that "no other clerical employe in the city of Fall River outside of the head of a department receives the amount of salary which this bill provides. This increase is in excess of salaries paid in all similar positions under the control of the city government."

On March 25 he vetoed a bill applicable to the city of Springfield under which city employes who serve in the organized militia would be entitled to full pay from the city during such service. In vetoing this he commented:

"I do not think the citizens of Massachusetts are going to continue to sit idly by and without protest watch this ever encroaching special legislation place burdens upon them, compelling many citizens to contribute toward the levy required for special legislation, who, from a financial standpoint, are much less able to contribute than are those who receive it. These special bills, granting special consideration to certain groups, appeal to one's sympathy and generosity, but the question comes as to what extent the citizens want their funds dispersed and their taxes increased by

special legislation of this sort. Every public servant must ask himself as to what right he possesses to pass legislation which will take from all the people their money and give it to a favored few or to a special group.

"The fundamental principle of treating all citizens on exactly the same basis is a desirable one to preserve, in my opinion."

This principle he again emphasized in vetoing, on March 27, the resolve to pay to the widow of of his salary from Jan. 10 to Dec. 31—practically a year's salary. This veto was overridden; but the principle upon which the veto was based stands. Said the Governor:

"The way of least resistance would be the easiest pathway for me to follow from the standpoint of sympathy, but I am more firmly convinced than ever that special legislation, giving away the tax-payers' money to special individuals or groups of individuals, is neither the proper function of government nor the fair and just treatment to which all citizens and their property under the law are clearly entitled."

On March 30 the Governor vetoed a bill authorizing Cambridge to pay a pension of half-salary to an employe of the library of that city. In his veto message he said: "There is no fundamental justice in these special pension bills which take taxes from the public at large to pay a special class of employes who during their time of employment have been favored with continuous employment under conditions above the average of the rank and file of citizens who pay these salaries through taxes or otherwise."

Another bill which had the purpose of paying to a widow of a public employe the balance of his yearly salary was vetoed by the Governor on April 12. This bill concerned the widow of a city clerk in Pittsfield. In vetoing this bill the Governor said:

"If the Governor is to approve the payment of the unearned remainder of a yearly salary of a city employe of Pittsfield, then he should be willing to approve paying the unearned remainder of a yearly salary for every other similarly situated employe of every city or town or county of the state. If we give to one employe, why not to all? Surely these gifts should not be given only to those whose friends can intercede with the Governor or who have powerful friends in the Legislature. In my opinion these gifts should not be granted to any person. I cannot do that which cannot be done for the humblest worker whose case is equally deserving, but who lacks an influential advocate."

On April 21 the Governor vetoed a mandatory bill, the effect of which would have been to raise the fees of certain county employes, a permissive bill of the year before having failed to get results. In comment in his veto message he said:

"To utilize the state government to secure individual increases in salaries or fees that rightfully should be considered and decided by the local government seems to me at variance with the good old-fashioned principle of town government, the essence of which was to keep the government close to the people. . . . To approve this bill is an open invitation to individuals of towns, cities and counties to ignore local self-government and secure by legislative action that which cannot be obtained from the government under whose jurisdiction the decision rightfully belongs."

One of the most notable vetoes, and one much discussed, was that of the bill to increase the salary of the registrar of motor vehicles. In his message which was of exceptional length, he said this: "This provision singles out one individual of the thousands of state employes and officials and gives to that individual a special favor never before requested, given or sanctioned."

An effort, under a bill establishing the minimum compensation for members of certain police departments, outside of Boston, who have served therein for five years, to utilize state legislation to fix salaries of city employes, was vetoed on grounds similar to those which served to veto the bill relative to the fees of county employes, as quoted above. "By force of legislative enactment," said Gov. Fuller in his veto message of May 11, "this bill attempts to compel cities and towns to do that which they can do without this legislation if the citizens and local government approve."

Thus these vetoes by Gov. Fuller command attention not simply for their individual interest, but because they indicate establishment of a new state policy—one which would make impossible the label pasted on the state in 1898 by Charles Warren—"Massachusetts as a philanthropic Robber."

FEDERAL POLICE COURTS.

With Appendix Containing a Comparative Study of the Criminal Business in the United States Court for the District of Massachusetts in 1913 and 1924.

By Arthur E. Sutherland, Jr.

INTRODUCTORY NOTE.

Law School of Harvard University, Cambridge, Mass.

16 March 1926

Editor, Massachusetts Law Quarterly:

My dear Sir:

I enclose herewith a manuscript to be considered by you for publication in the Massachusetts Law Quarterly. It is written by one of the prize men of last year's class who worked on it in a seminar of mine in Federal Jurisdiction. The reason I submit it for your consideration is that its detailed material [in the Appendix] as to the actual business of the present federal courts was drawn from Judge Morton's court and deals with the Massachusetts data. I hope you will think it is fit for your pages. If not, will you be good enough to return it?

Cordially yours,

Felix Frankfurter.

MR. SUTHERLAND'S ARTICLE.

Ever since the War of American Independence, there have been in this country two schools of political thought. The adherents of one conceived of the United States as a group of sovereign commonwealths leagued together in a loose confederation. The other school thought of the United States as a political unit, with the individual states as mere subdivisions for administrative convenience. In a day when political enthusiasms ran high, Federalist leaders eagerly sought ways to strengthen the central government. Alexander Hamilton wrote in 1799,[1]

> "The measures proper to be adopted may be classed under heads.
>
> First.—Establishments which will extend the influence and promote the popularity of the Government. Under this

[1] Letter, Hamilton to Dayton, J. C. Hamilton's ed. Hamilton's Works, (1851) v. 6, p. 384.

head three important expedients occur. First, The extension of the judiciary system. . . .

The extension of the judiciary system ought to embrace two objects:—one, the subdivision of each State into small districts (suppose Connecticut into four, and so on in proportion), assigning to each a judge with a moderate salary—the other, the appointment in each county of conservators or justices of the peace, with only ministerial functions, and with no other compensation than fees for the services they shall perform. This measure is necessary to give efficacy to the laws, the execution of which is obstructed by the want of similar organs and by the indisposition of the local magistrates in some States. The Constitution requires that judges shall have fixed salaries; but this does not apply to mere justices of the peace, without judicial powers. Both those descriptions of persons are essential, as well to the energetic execution of the laws as to the purposes of salutary patronage.

The thing no doubt would be a subject of clamor, but it would carry with it its own antidote, and when once established, would bring a very powerful support to the government."

Hamilton proposed to establish federal courts of a very minor sort. The Judiciary Act of 1789[2] had erected one District Court for Connecticut, while Hamilton suggests four, and reinforces this scheme by the proposal for federal justices of the peace. As his words indicate, he hoped by this means to create more efficient machinery for law enforcement, and furthermore, to extend and strengthen the influence of the federal government.

The political views of the Federalists have prevailed. The supremacy of the federal Constitution over the federal and state legislatures was early established.[3] The Civil War convinced the South that the central government was dominant. The "due process clause" of the Fourteenth Amendment as interpreted by the courts, —the broad construction given to the constitutional grant of power over interstate commerce,—the passage of anti-trust laws, and the erection of such agencies as the Interstate Commerce Commission and the Federal Trade Commission,—by these and other steps the federal government came to take charge of many matters originally of local concern. People have come to look to Washington for the laws they desire. The Eighteenth Amendment is an extreme manifestation of this federalizing process.

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[2] 1 Stat. at L. 73.

[3] *Marbury* v. *Madison*, (1803) 1 Cranch 137; *McCulloch* v. *Maryland*, (1819) 4 Wheaton 316.

Hamilton's other desire,—that of improving the machinery for the enforcement of federal laws,—has not yet been well satisfied. The National Prohibition Act, passed in pursuance of the Eighteenth Amendment, has created a large number of crimes of the grade usually dealt with in the lowest tier of state courts. Section 29 of that Act provides for fines up to $1000, or imprisonment up to six months, or both, as a punishment for the first conviction of illegal transportation or sale of liquor. First offences against any other regulation of the title for which a special penalty is not prescribed are punishable by fine up to $500; and for second offences of the sort fines from $100 to $1000, or imprisonment up to ninety days may be imposed. The offences so punished are easy to commit, and a large proportion of the population of the country is eager to commit them. The federal government faces the task of imposing a countless number of small penalties for crimes which are without moral connotation to most of the offenders.[4] The present judicial system is but ill-adapted to accomplishing this end.

Prosecutions brought in the District Courts ordinarily proceed in three stages. The offender is arrested and taken before a United States Commissioner, who decides that there is reasonable cause for his detention, and admits him to bail or orders his confinement. The next step is the formulation of a more extended charge against the defendant. This may conveniently be accomplished by a United States' Attorney, who writes a statement of the charge on an information blank, which he hands to the District Judge. If procedure by indictment instead of by information is used, the facts of the alleged offence are brought to the attention of a Grand Jury, which returns a true bill if it believes that there is reasonable cause to find the defendant guilty. Finally the accused man is arraigned before the court, where he pleads guilty and is sentenced, or else stands trial by jury.[5]

The federal judges are selected for their ability to handle matters of great weight and importance. Prosecutions under the

[4] While the National Prohibition Act is the most prominent example of federal police regulation, it does not stand alone. Under the Interstate Commerce Act, for example, failure on the part of a carrier to report certain accidents is a misdemeanor, penalized by a fine of not over $100 (36 Stat. at L. 350). Violations of the Migratory Bird Treaty Act are misdemeanors punishable by fine of not over $500, or not over six months' imprisonment, or both (40 Stat. at L. 755). Certain offences under the Plant Quarantine laws are misdemeanors, punishable by fine up to $500, or imprisonment up to one year, or both (37 Stat. at L. 318).

[5] Byrne, "Federal Criminal Procedure," is a convenient manual in which the proceedings here touched upon are explained at length.

Sherman Act, controversies involving foreign commerce and ships, questions on the proper construction of the "due process clause" of the federal Constitution, are constantly demanding their attention. Yet when that very large number of persons who are arrested for selling, transporting or manufacturing intoxicants or forbidden apparatus have come before these judges, in an overwhelming majority of cases[6] the whole judicial duty consists in receiving a plea and imposing a petty punishment. The learning and experience that characterize the occupants of the federal bench might be used to some advantage if these defendants habitually demanded jury trials, for the proper conduct of which a large measure of judicial skill is desirable. But where in one year, in one federal district court, 592 pleas of guilty were received in liquor cases, as contrasted to 23 verdicts of guilty returned for such offences,[7] it will be very apparent that in this type of business the function of a judge is reduced to that of a plea-taker. To be sure, he must impose penalties. But if it be a true hypothesis that the petty offences are most frequently committed, and if the national government is thorough in its enforcement of the law, the district judge will have all his time occupied in meting out punishments of the grade ordinarily handled by our city police magistrates.[8] Such a situation necessarily disgusts the occupants of the federal bench, and tends to keep desirable men from looking to federal judgeships as a career.

Conceivably, with the present system, petty offenders might be disregarded, and the machinery of law enforcement might be

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[6] Exact figures are hard to procure. Those given were obtained by the author in April, 1925, through the courtesy of Judge Morton of Boston. It was necessary to go over the journal kept by the Clerk of the District Court in that city, note down the cases disposed of day by day, and tabulate the information so obtained. In the year 1924, in the court mentioned, there were, in liquor cases, 23 verdicts of guilty, sixteen verdicts of not guilty, and one disagreement. During the same year there were 592 pleas of guilty to liquor offences.

[7] See footnote 6.

[8] The (1909) New York Penal Law, section 1221, provides,

> "*Intoxication in a public place.* Any person intoxicated in a public place may be arrested without warrant while so intoxicated, and be taken before a magistrate having jurisdiction for examination on a charge of public intoxication. If such is sustained the court or magistrate shall: . . .
>
> 2. Impose upon such person a fine not exceeding ten dollars, or a sentence of imprisonment not exceeding six months, or both such fine and imprisonment; . . .

Under the (1921) Mass. Gen. Laws, Ch. 138, section 86, violations of the Massachusetts liquor laws for which a specific penalty is not imposed, are punishable by fine of fifty to five hundred dollars, and by imprisonment from one to six months. Ch. 218, section 26, gives the District Courts (the term by which "police courts" are described in Massachusetts) jurisdiction of all misdemeanors except conspiracies and libels, and all felonies punishable by imprisonment for five years or less. It follows that the offences described above are cognizable in the District Courts.

directed only against the larger crimes.[9] Undoubtedly there are enough of these to keep the existing courts busy, and the cases so presented would be important enough to merit the attention of the present federal bench. But this suggestion leaves the national government confessing its powerlessness to enforce a law which is being constantly violated, and on which the attention of the whole country is centered It seems more desirable to say that the creation of a new group of federal police regulations calls for a system of federal police courts to handle this multitude of prosecutions.

The proposal to establish such a system of courts must be kept within certain limitations, constitutional and practical. The cost must be kept as low as possible,. for a great many of the courts would be needed. The procedure must be swift, and still there must be no violation of the constitutional guarantees of presentment by Grand Jury, and trial by Petit Jury. Furthermore the defendants who come before these tribunals must not go away without a respect for the institution and the government it represents. It is the purpose of this essay to suggest a solution for these problems.

The Federal Police judge already exists *in parvo,* in the Commissioner. He already acts as a committing magistrate. An Act of Congress could be passed requiring membership in the Bar as a prerequisite to appointment as Commissioner, and fixing a salary equal to that usually enjoyed by police justices.[10] The Commissioner should be given a court-room of sufficient dignity to impress the defendants with the importance of the proceedings. Instead of committing alleged offenders to bail or detention for future proceedings in the district court, the Commissioner could receive the pleas of those who wished to admit guilt, and impose sentence immediately. The small number demanding jury trials could be held for the district court, where they would receive the benefit of the experience of the district judge in the conduct of the trial.[11]

[9] This theory has been followed by Mr. Emory R. Buckner, United States Attorney for the Southern District of New York. See a speech by Mr. Buckner, reported in the *New York Times* for January 25th, 1926.

[10] The federal Constitution, Art. III, section 1, provides in part,

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

This language seems amply strong enough to permit the establishment of the proposed police courts.

[11] The Supreme Court has held that a defendant charged in a federal court with a minor offence may waive trial by jury, even though no statutory authority for such waiver exists. *Schick* v. *U. S.,* 195 U. S. 65. See *U. S.* v. *Praeger,* 149 Fed. 474. It is possible that defendants wishing to go to trial, but willing to waive a jury, could be tried by the proposed police judge. It seems, however, that offences under the National Prohibition Act could rarely be tried in this way, for because of popular sympathy most defendants who wished a trial at all, would want a jury.

If charges of crimes requiring indictment were preferred, the Commissioner could hold the defendant for the Grand Jury as he now does. But the great number of persons accused of small offences and willing to plead guilty, could pay their fines or receive their small jail sentences on the day after their arrest, when the impression of the majesty of the law is not yet dulled by the passage of a number of weeks without punishment. The business could be handled as speedily as traffic offences are handled.

Under the Constitution, judges are to hold office during good behavior, and their salaries are not to be diminished during incumbency.[12] It may be suggested that the numerous and not very important positions created by the proposed legislation would be mere political trophies, handed over to the faithful fishers of men at the last election,—convenient retiring-places, constitutionally safeguarded for life. The answer to this objection seems to be that an office which can not be readily emptied is poor material for a political reward, and that conceivably when an appointee came to realize that his security no longer depended on the goodwill of the local leader, he would turn to his judicial duty with a lighter heart and increased vigor and efficiency.

A more important constitutional objection to federal police courts arises out of the Fifth Amendment, which provides—

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;—."

It may be said that one of the most desirable features of the suggested system of courts is its swift disposal of cases on pleas of guilty, without the formality of Grand Jury procedure. If most of the prosecutions in connection with the newer federal regulations are brought for "capital or otherwise infamous crimes," much of the advantage of the new courts will be lost. This objection makes necessary a discussion of the nature of an "infamous crime."[13]

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[12] Constitution, Art. III, section 1:

"The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a compensation, which shall not be diminished during their Continuance in Office."

[13] The distinction between crimes which are infamous and those which are not, is often confused with the distinction between felonies and misdemeanors. The federal Penal Code, section 335, provides

"All offences which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offences shall be deemed misdemeanors."

The question of what constitutes an infamous crime, on the other hand, depends on the construction given by the courts to the word "infamous" in the Constitution, Amendment V.

The character of infamy which attaches to an offence comes from the nature of the punishment which may be prescribed. This becomes clear when the history of the clause in question is considered.[14] Its original form is to be found in the recommendations drawn up by the Massachusetts convention which adopted the federal Constitution. It then read, "No person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."[15] In 1789, at the first session of the House, Madison introduced the clause, "In all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary." It was then referred to a committee of which Madison was a member, and was reported back in about the same form in which it was adopted,[16] in which the linking of "capital" with "infamous" clearly shows that the punishment is what gives color to the crime.

In *Brede* v. *Powers*,[17] after procedure by information, the defendant had been convicted of a violation of Sec. 21 of the Volstead Act, in maintaining a liquor nuisance, and was sentenced to the Essex County, New Jersey, jail for sixty days, and fined $500. The maximum possible sentence under Sec. 21 is a fine of $1000 and one year's imprisonment. The defendant brought a writ of *habeas corpus* on the ground that he had not been indicted as the Fifth Amendment requires, but the Supreme Court discharged the writ, saying that the sentence could not have been at hard labor, and hence that the punishment provided was not infamous.[18] In

[14] The account given here of the evolution of the grand jury requirement of the fifth amendment is drawn from the opinion of Gray, J., in *Ex Parte Wilson*, 114 U. S. 417.

[15] Journal, Massachusetts Convention of 1788, (ed. 1856) 80, 84, 87; 2 Elliott's Debates, 177.

[16] 1 Annals of Congress, 435, 760.

[17] *Brede* v. *Powers*, 263 U. S. 4.

[18] *Brede* v. *Powers* was followed by *Wyman* v. *U. S.*, 263 U. S. 14. In the latter case the prosecution was begun by an information, and the defendant was sentenced by the District Court for the Eastern District of New York to the Essex County, New Jersey, jail for a term of 45 days on conviction for selling whiskey in violation of section 3, title II of the National Prohibition Act, punishable under section 29 of that Act by a fine of not more than $1000, or imprisonment for not more than six months. On a writ of error, the Supreme Court held that procedure by information was proper.

Where the National Prohibition Act prescribes imprisonment, there is no express statement as to whether or not it is to be at hard labor. The Supreme Court, in *Brede* v. *Powers*, inferentially indicates that imprisonment for a shorter period than one year, if at hard labor, would attach infamy to the crime for which it was a punishment. But as procedure by information was approved in that case, where a sentence of one year's imprisonment was permissible, it seems that in the absence of statutory command, the penalty must be taken to be the term without hard labor.

accordance with this decision of the Supreme Court of the United States, under section 29 of the Volstead Act, procedure without indictment is possible in the case of first offences of selling and manufacturing, first and second offences of transporting, advertising, dealing in the means for manufacturing, or soliciting orders for liquor, violating permits, making false records and reports, and in all cases of maintaining a liquor nuisance.[19] Clearly the class of offences under the Volstead Act in which indictment is unnecessary is a very large one, and offers scope for plenty of activity on the part of the proposed police courts.

A last, and perhaps the strongest, protest against the proposal is certain to be based on grounds of policy. People will say that the federal government is already interfering in too large an extent with matters properly of local concern. To improve the means of doing this is only to increase an existing evil, and put a United States Marshal in every man's cellar. Furthermore, the government of the United States, and the federal courts, have always been associated in the public mind with weighty matters,—with austere dignity. This shining spectacle will be very much tarnished if that national government takes to holding police courts of a morning, where the flask-carriers and down-at-the-heel bootleggers, rounded up the night before, are fined, lectured, and sent home to bed. Such observations really require no answer. A reading of the National Prohibition Act furnishes all the refutation necessary. The people of these United States have seen fit to enact a law in the nature of a police regulation. As they have not repealed it, it must be supposed that they want it enforced, and there is more dignity in administering such a law with appropriate machinery, than there is in leaving it to futility while the whole world smiles.

ARTHUR E. SUTHERLAND, JR.

[19] National Prohibition Act, 41 Stat. at L. 305.

[see Appendix on next page]

APPENDIX.

A. A List of the Federal Crimes for Which One or More Prosecutions Were Brought in the Two Years 1913 and 1924, in the Boston Federal District Court.

The offences are here listed under the several headings of constitutional power which enabled the federal government to make crimes of the acts in question. The tables given in this appendix all cover the two years 1913 and 1924. It was thought that the comparison of the criminal work of the courts before and after prohibition and the war might prove interesting.

1913

Interstate Commerce Clause.

Obstructing navigation.
Mann Act.
Insecticide Act.
Meat Inspection Act.
Liquor in Interstate Commerce.
Passenger Act.
Anti-Trust Act.
Steal goods from interstate commerce.
Transporting stolen goods.
Interstate Commerce Act.
Assault on the high seas.
Food and Drugs Act.
Burning a vessel.

Post offices and post roads.

Mail fraud.
Obscene letter.
Detaining letter.
Stealing from post office.
Mail lottery.
Forge money order.
Destroy letter boxes.
Poison in mail.

Army and Navy.

Harboring deserter.
Pension fraud.

Courts.

Perjury.

Money.

Counterfeit.

Imposts and excises.

Drug offences.
Smuggling.
Assault customs officer.

Bankruptcy.

Bankruptcy crimes.

Immigration.

Immigration offences.

1924.

Interstate Commerce Clause.

Food and Drug Act.
Mann Act.
Insecticide Act.
Meat Inspection Act.
Steal cargo of U. S. vessel.
Plant quarantine.
Disclosing information about a shipment in interstate commerce.
Illegal use of passes.
Stolen auto in interstate commerce.
Steal goods in interstate commerce.
Obscene books in interstate commerce.
Soliciting information as to routing.

Post offices and post roads.

Mail fraud.
Arson of U. S. building.
Steal mail.
Chemicals in mail.
Embezzle C. O. D. funds.

Army and Navy.

Steal military property.
Impersonate U. S. sailor.
Fraudulent claim for war risk insurance.
Assault, on government reservation.
Entering military reservation.

Courts.

Perjury.

Money.

Counterfeit.

Imposts and excises.

Drug offences.
Assault customs officer.

National Bank.

Crimes concerning National Banks.

Bankruptcy.

Bankruptcy crimes.

Treaty-making power.

Migratory Bird Treaty Act.

Immigration.

Immigration offences.

Liquor Amendment.

Manufacturing, possessing, or selling liquor; possessing machinery or materials, etc.
Bribing a federal officer.
Assault on an enforcement officer.
Impersonating a federal officer.

Total number of headings on 1913 journal, 30.
Total number of headings on 1924 journal, aside from liquor, 30.

B. Pleas of Guilty to Various Offences.

In a surprisingly large number of cases, defendants who originally pleaded not guilty change their pleas to guilty. As this adds one more complication to the administration of the law, it was thought wise to list such cases separately. Pleas of *nolo contendere* have been treated as pleas of guilty.

	Pleas Guilty.		Retraction plea not guilty, and plea of guilty.	
	1913	1924	1913	1924
Mann Act	1	1	—	2
Insecticide Act	1	—	—	—
Meat Inspection Act	—	1	—	—
Liquor in interstate commerce	1	—	—	—
Passenger Act	1	—	—	—
Anti-trust Act	2	—	—	—
Stealing from interstate commerce	3	1	—	—
Transporting stolen goods	1	—	—	—
Transporting stolen auto.	—	1	—	—
Food and Drugs Act	1	1	—	—
Plant quarantine	—	1	—	—
Mail fraud	3	1	1	6
Obscene letter	—	1	—	—
Stealing from post office	6	—	2	—
Other postal offences	8	3	2	1
Assault on government res.	—	—	—	1
Entering mil. reservation	—	—	—	3
Arson of U. S. property	—	—	—	1
Stealing U. S. property	—	7	—	5
Perjury	—	1	2	1
Counterfeiting	—	5	1	3
Drug offences	3	9	1	9
Smuggling	—	—	2	—
Assaulting customs officer	1	—	—	—
Other Internal Rev. Crimes	8	—	—	—
Bankruptcy crimes	1	1	1	2
Immigration offences	—	—	2	1
National bank offences	—	3	—	3
Migratory bird treaty act	—	2	—	—
Impersonate U. S. Officer	—	3	—	1
Liquor Amendment	—	422	—	166
Not classified	1	—	—	—
Totals	42	464	14	203

Total pleas of guilty, whether original, or after a plea of not guilty and a retraction, in 1924, 667. 88.7% of these pleas were taken in liquor cases. Excluding the liquor cases, only 75 such pleas were taken. In 1913, 56 defendants pleaded guilty. It is interesting for purposes of comparison to note that in 1913 there were 12 verdicts of guilty; in 1924, 34.

C. Verdicts.

1913.

	Guilty	Disagree	Not guilty
Mann Act	5	—	—
Food and Drugs Act	1	—	—
Mail fraud	—	—	1
Mail lottery	1	—	—
Other postal offences	1	—	—
Pension fraud	1	—	—
Counterfeiting	—	—	1
Drug offences	1	—	—
Smuggling	—	—	1
Bankruptcy	2	—	—
Totals	12	—	3

1924.

	Guilty	Disagree	Not guilty
Mann Act	1	1	1
Mail fraud	3	1	1
Other postal offences	1	—	2
Steal U. S. Property	1	—	—
Perjury	1	—	—
Counterfeiting	—	—	1
Drug offences	1	—	—
Assault customs officer	1	—	—
Bankruptcy crimes	1	—	2
Impersonate U. S. Officer	1	—	—
Liquor crimes	23	1	16
Totals	34	3	23

Forty percent of the verdicts returned were not guilty. Sixty-eight percent of the verdicts returned were in liquor cases. Forty percent of the verdicts in liquor cases were not guilty. The percentages here given are for 1924 only. In 1913, there were fifteen verdicts returned in all. In 1924, in cases not concerning liquor offences, there were seventeen verdicts returned.

D. Sentences Imposed.

This table does not give the size of the fine or the term of the imprisonment in any case. It gives only the number of sentences of any sort that were imposed for each crime.

	1913	1924
Food and Drugs Act	1	—
Mann Act	6	2
Insecticide Act	—	2
Meat Inspection Act	—	1
Steal cargo of U. S. vessel	—	1
Plant quarantine	—	3
Illegal use of passes	—	1
Transporting stolen automobile	—	3
Stealing from interstate commerce	—	3
Obscene books in interstate commerce	—	2
Mail fraud	1	9
Liquor in interstate commerce	1	—
Passenger Act	1	—
Anti Trust Act	2	—
Stolen goods in interstate commerce	1	—

Miscellaneous postal offences	4	4
Obscene letter	1	1
Mail theft	3	—
Steal military property	—	21
Assault, on Government reservation	—	1
Entering a military reservation	—	2
Harboring a deserter	1	—
Perjury	1	4
Counterfeiting	—	4
Drug offences	4	17
Assaulting customs officer	2	—
Other internal revenue offences	7	—
National bank crimes	—	5
Bankruptcy crimes	3	5
Immigration offences	1	1
Migratory bird treaty	—	2
Liquor crimes	—	586
Unclassified	1	—
Totals	41	680

Eighty-six percent of the 1924 sentences were imposed in liquor cases.

E. Writs of Error.

No record of the allowance of writs of error was found in 1913 criminal cases. There were nine such writs allowed in 1924, of which six were in liquor cases, and one each in cases of mail frauds, mailing of chemicals, and counterfeiting.

F. Informations and Indictments.

To gain some insight into the relative numbers of cases prosecuted by information, and those brought by indictment, the Criminal Docket No. 17, containing the entries for cases 5501 to 6000, was examined. Most of these cases were pending during the latter half of the year 1924. Of the 500 cases, 434 were liquor prosecutions. 353 were brought by indictment, against 81 by information. Thus 87% of the cases were liquor prosecutions, and of these 19% were brought by information.

G. Sentences According to Constitutional Powers.

	1913	1924
Interstate commerce	12	18
Postal	9	14
Army and Navy	1	24
Courts	1	4
Imposts and excises	13	17
Bankruptcy	3	5
Immigration	1	1
National Bank	—	5
Bird Treaty	—	2
Money	—	4
Liquor amendment	—	586
Unclassified	1	—
Totals	41	680

Total sentences in 1924 aside from liquor cases, 94.

H. Jury Days.

While it seemed desirable to gain an idea as to the amount of time spent in jury trials, it was difficult to obtain accurate figures as to this from the clerk's journal. As a very rough approximation, a unit called a jury day was taken to consist of any day or part of a day, in which a jury was being impanelled, or a jury trial was being conducted. The jury days spent in the prosecution of the various offences are given in this table.

	1913	1924
Mann Act	17	4
Food and Drugs Act	3	—
Burning a vessel	2	—
Mail fraud	16	17
Stealing from postal property	—	5
Mail lottery	2	—
Harboring a deserter	1	—
Pension frauds	6	—
Perjury	—	3
Counterfeiting	2	2
Drug offences	2	2
Smuggling	3	—
Assault customs officer	—	1
Bankruptcy offences	15	5
Impersonating a U. S. Officer	—	1
Transporting a stolen automobile	—	1
Stealing property in interstate commerce	—	2
Liquor amendment	—	55
Totals	69	98

In 1924, the jury days in liquor cases were 56% of the total days.

Note.

An extended study of the practice throughout the colonies and states prior to and at the time of the adoption of the Federal Constitution as to the trial of various offences, as illustrating the practical meaning and limitations of the constitutional right to jury trial will be found in the *Harvard Law Review* for June, 1926.

Ed.

THE EAGLE AND THE OYSTER.

(An Address on the Constitution by Professor G. W. Dyer of Nashville, Tennessee, before the New York Southern Society.)

What is it that is really great in our American system? What is it that is really great in the Constitution of the United States? I have been studying the Constitution in the last few years, and I have been amazed at my own stupidity, but I found consolation in the fact that I had lots of company. You know, I am more and more impressed with the natural stupidity of the human mind. It is rare indeed that you can find anybody that can think anything that has not been thought. All of us can imitate, but monkeys can do that. I think there is something in what the Indian said when he was commenting on the radio. He said, "White man ain't so smart. Why didn't he find the radio before he put up all them wires?"

No, it takes the human mind a long time to reach a small thought. They say men used a one-prong eating fork two hundred years before it occurred to some brilliant fellow that if you would put another prong on it, it would improve the fork. They chased tough beefsteaks around a one-prong fork for 200 years before anybody thought to add another prong.

I said that some time ago, and a man said, "That's nothing. Men for six thousand years went through all sorts of contortions trying to crawl through a hole in a shirt before it occurred to some brilliant genius to split the thing open and make it easy."

And that doubtless was accidental.

We will never understand the Constitution of the United States without understanding the great philosophy back of the Constitution, that was in the brain and heart of those who gave it to us. From their point of view the chief thing to be attained by government is the freedom, the most complete freedom possible, of the individual. Their conception of government was self-government, and by self-government they did not mean what we say today. By self-government they meant the freedom of the individual to direct his life in his own way with the least possible interference from any source.

The function of government, or the functions, were limited to this, that his freedom can be properly interfered with only when its exercise jeopardizes the life of society or when it infringes upon

another man's freedom. And from their point of view the ideal government is the government that protects and guarantees the largest possible freedom of the individual in every relation of life. That accounts for the freedom in religion clause, freedom of speech, freedom of press, freedom of contract, freedom everywhere.

Now we accepted this theory and we practiced this theory of self-government in this country for the first fifty years. But when steam was applied to transportation and manufacturing, it caused an industrial revolution which brought people by the millions from the rural sections and small towns into the great cities. I say it brought them. They came. Understand, there is a big difference between being brought and coming. The people did not have to congregate in these cities. It is well to remember that. They came of their own accord. It is another thing which it is well to remember, that they do not have to stay there. And when they came into the cities, they did some very strange things, and they created some very serious problems. I do not know anything more unnatural than that six million American people should live in New York, but there it is, and when they came in, it seemed as if they all wanted to get just as close as they could jam together. No reason for it, no demand for it, but they just liked to jam, and they not only jammed up against each other, but piled on top of each other.

And so, as a result of this stupidity from that point of view of those that are suffering, they have created all sorts of problems.

There is the problem of high rent. What makes high rent? The landlords cannot fix the rent. That is a myth. The people themselves fix the rent. The more people that want to live at any one point, the higher the rent goes. They can solve the problem any day if they want to decentralize. They do not want to decentralize. They congregate at the high rent, and they have made family life impossible, and the family life is going to pieces.

They have created high cost of living, and voluntarily and unnecessarily created some very serious problems, by the misuse of this freedom. And then, as they face these problems, they do what people generally do when they make fool mistakes. Someone said once, when a wise man makes a mistake, he always takes the blame to himself. When a fool fails, he always puts it on some one else.

The people have come in and voluntarily created more serious problems for themselves, and they blame it on the Constitution

of the United States. Over four million of them voted to abolish the Constitution. They thought, a great many of them, that that was the cause of their trouble, the high rent, and so forth.

And Wall Street. Wall Street is the cause of all of it! And capital! They remind me of a story of a boa constrictor. A boa constrictor was crawling along through the field and came up to a rail fence, and he decided to go through a crack, and the crack was just about big enough for him to go through. But just before he started to go through, a rabbit jumped up, and he was very fond of rabbits, and he just had to swallow them when they came in his range, regardless of what problem it might create. That is the trouble with most American people. He swallowed the rabbit and started to go through the fence, and got down to the rabbit and he could not go any further. Well, he scrambled around there a good while, and while he was scrambling, another rabbit jumped up on the other side, and he just had to swallow them, and he caught that rabbit when he got in range, and swallowed that one too. Then he had a rabbit on either side of the fence. It is just the predicament of millions in our city. Then he philosophized on it just as they do and as we do, and he said he was the victim of unfortunate conditions, over which he had no control.

And so, as we face these new conditions which are of our creation, we are coming to the conclusion that the old theory of self-government will have to go. Instead of adjusting conditions to our theory, we are resorting to the stupid policy of changing our theory of government as conditions change, and there is no end to that, because they may change differently tomorrow, and you would not have any theory. And so we say, "Oh, well, this self-government was all right for the early Americans, but it won't do today. Men cannot take care of themselves today, conditions have changed."

Conditions have changed, gentlemen. Conditions have changed, but how have they changed? When the theory of self-government was launched, the individual was living under most trying conditions. When this great theory of government was launched, men by the hundreds were pulling out from Virginia and North Carolina and going into the wilds of Tennessee to fight the Indians, facing the most serious dangers that any people in the world have ever faced, living for months even without bread, and the Indians killing on an average a man, woman or child for every ten days for fifteen years. Conditions have changed. They might have made

a very good case against self-government then. But what do we find now?

There never was a time in the history of this country when it was so easy for a man to make a living as it is today. There are farms all over the country that are just waiting for men to come out there and they will finance them to start business for themselves. In every small town in America a man can enter almost any business in that town practically without capital. A man can go into the banking business today practically without any capital at all. There are thousands and thousands of banks all over the country run by men practically without capital.

If you come to the city, did you ever think about the thousands and thousands of opportunities for men of courage and energy to begin business for themselves in the City of New York without capital? You take the restaurant business. Women have about quit cooking, and so it is about the biggest business we have. All the capital that is required is enough money to buy a coffee pot and you start your restaurant. Even the Greeks are coming over here, poor as Job's turkey, and starting in business for themselves in all of our cities.

You take the dray business, the taxicab business, the garage business, the building business, I venture to say that nine-tenths of the builders of this country have practically no capital, and yet we say there is no opportunity. Why, as a matter of fact, if you go over this country you will find this, that a man who is able to buy a Ford car—and you can buy it by paying five dollars a week—can start competition with the railroads, and they are not only starting, but they are beating the railroads, and running the trains off the tracks all over this country, until the railroads are crying out that they have been whipped by these little fellows.

If there ever was a time in the history of our country when the theory of self-government was feasible, it is here and now, and yet we have joined in to destroy it, and it has been in large measure destroyed.

We no longer believe in a government that gives men freedom. We believe in restriction. Congress is meeting, and there will hardly a day pass during the session of that Congress that somebody will not be trying to put restriction on someone to curb his freedom, and when your legislature meets it is the same thing. There is hardly a woman's club in this country that is not concocting some scheme to restrict somebody's freedom, and from

every platform and every source the chief concern is, how can we put greater and greater restrictions on the freedom of the individual.

The Socialist's theory is that men ought not to be left to take care of themselves, that the government ought to take care of them. And right here is where Socialism is making its biggest inroads. You have got organizations all over this country and laws passed from every quarter for what purpose? To take care of somebody. And all over this country individuals and groups are coming up and pleading to be taken care of. And so the good women—and they are good women, they mean well—as they have entered into this sphere, their chief purpose in politics seems to be to take care of somebody.

Women told us a few years ago that as we met these serious problems, if we would give them the right of suffrage and make them equal with the men in every way, they would show us something. Well, they have kept the promise, but they are not showing us what we thought they would show us. And we hear much today coming from Socialism, from your old discarded paternalistic theory of government, that what we want is to get the motherly instinct into society. Now the motherly instinct brings heaven to the home, but it always has brought hell to society when it has been tried, because the nature and function of the home are fundamentally different from the nature and function of government.

If the mother eagle were to continue to take care of and protect and feed the young eaglets in the nest, they never would leave the nest. But even the eagle understands that the functon of the home is fundamentally different from the function of society, and there comes a day when the whole ethics are changed, and that is the reason they become eagles and do not remain eaglets.

I think one of the greatest dangers to the American life today is wealth, but not as ordinarily defined. The fact that a few men are accumulating large quantities of wealth does not worry me a bit. I do not lose any sleep over it, because I know that under our theory of wealth all that they have really belongs to us. Your whole question of private property is largely a myth. It is a shrewd scheme by which society makes men work themselves to death under the hallucination that they are working for themselves, when they are really working for society.

But what is this country coming to when a few men own the "wealth"? It just means they are working like smoke for us.

Why, a man after he accumulates a few thousand dollars has to quit working for himself. Henry Ford, if he lived a thousand years, never could spend one hour for himself. He cannot do it. Individual ownership of property, private capital, is in no sense inconsistent with social service. As a matter of fact, it is through private capital that we gain the greatest possible social service.

A man may be as mean as Satan, but he cannot use his wealth unselfishly to save his life, under our system. If he has a million dollars, what is he going to do with it? He has got to dedicate it to society. A rich man cannot eat any more than I can. I have eaten with them, and I know they cannot. No man can consume much wealth. If a man has got a million dollars, under our wonderful system of self-government, he has got to invest it in a factory or store or shop of some kind, and if he does that, he dedicates it to the service of the people. And if he is too lazy to do that, and he puts it in a bank, the bank sends it out the next day. He just cannot keep it out. So it does not worry me. And people all over this country are telling you, "Oh, the Government ought to own the railroads, and use them for the people." Why, we already own them. It is a long ways better than owning them. We let the people raise the money and run the railroads, and we just sit back and at the end of the year we call upon them to hand over whatever we say. What a wonderful system it is, too! They are handing over now 50 cents out of every excess dollar they get, and we could make them pass over 60 cents if we wanted to. Why lose sleep over anything like that?

Now, in conclusion, my friends, this is a fight between two ideals, the American ideal, the ideal of the Constitution, before we destroyed it partially. I was invited some time ago to speak at a Constitutional meeting in Tennessee. I told them I did not know whether it was a meeting called on the Constitution or a memorial service on the Constitution. But we have got a whole lot of it yet. It is a struggle between these two ideals. The American ideal is to make every man as free as possible and let him take care of himself. The theory of American government is that that government which is weakest is strongest, and the government that is strongest is weakest.

The theory of Socialism says, No, this freedom won't go. Let the government take care of folks. There are the two theories before you.

Did you ever think about the difference between an oyster and

an eagle? You will admit there is a whole lot of difference, whether you have considered the question or not. An oyster has so little life I don't believe the oyster knows whether he is dead or alive. If you ever stood right close to an American eagle, he did not impress you that way. He impressed you as teeming with vitality and power and life. If you were standing close to him as he looked through you with those piercing eyes, you shuddered and you said, "How I would hate to have that thing get hold of me." You did not feel that way about the oyster. You were not scared of the oyster at all. Why the difference?

When God made the eagle, he pushed him out and said, "Old fellow, you are free, take care of yourself." The eagle is a real American. Don't look to Congress, take care of yourself. And the eagle's life has been a most strenuous one. He has had a hard time and many a fight. You know, he has to get up every morning and look for his breakfast. Suppose the women had to do that. And the same for his dinner and for his supper. That is what the early Americans had to do when they launched this theory of self-government.

The oyster is a Socialist. The oyster believes that a fellow ought to be taken care of. And the Lord takes care of the oyster. I don't know why, but He does. I have thought sometimes He gave us the oyster just to show us what Socialism would do for a fellow. You know, he builds every oyster a house, and it is a good one, too. The oyster does not have to worry over architects, over bricklayers, stonemasons and steamfitters. No, it is all done for him, and his house is beautiful and artistic on the inside. He has all his children cared for. He does not have to worry over his children at all. He does not have to worry over unemployment. He does not have to worry over making a living. Why, many an American girl looks upon the oyster's life as being ideal. The oyster does not have to do anything except lie in this beautiful house and be taken care of and sleep and dream and improve his mind. That is the reason he hasn't got any mind.

That is the reason he is an oyster.

In a fight like this, between the eagle and the oyster, the issue is, shall we now take the eagle down and substitute a big, fat oyster? Surely there is no doubt about where Southerners will stand in this fight.

THE REASONS OF THE OPPONENTS OF THE BILL TO EXTEND THE RULE MAKING POWER OF THE SUPREME COURT OF THE UNITED STATES.

The proposal that the Supreme Court of the United States should make rules for all the Federal Courts for actions at law as they do for equity practice has been much discussed in recent years. In the following address of Senator Walsh who is the leader of the opposition in Congress, (printed as U. S. Senate Doc. No. 105 of the 69th Congress, 1st Session), he says that the discussion in the press has generally been confined to expression of approval and that

> "Even the legal periodicals have, as a rule, contented themselves with caustic references to Members of the Senate who have deemed it their duty to oppose the legislation, comprising, as indicated, a majority of the members of the Committee on the Judiciary, notwithstanding the mutations it has undergone in 13 years, rather than to give their readers an analysis of the measure with a discussion of the objections to which it is said to be subject. Though they have been in form available at any time within the past 10 years, I have seen nowhere in any law journal any copy of the views of the majority of the committee, or even any review of the reasons impelling them to the course they have pursued."

In view of this statement, as Senator Walsh has stated the substance of the opposition of the minority report of 10 years ago in his Texarkana address, we reprint that address in full without comment, except to call attention to the remarks along similar lines in a very practical address by Hon. James M. Morton, Jr., of the United States District Court for Massachusetts before the Judicial Section of the American Bar Association in 1924 which was reprinted in the MASSACHUSETTS LAW QUARTERLY for August, 1925, pp. 6-8. Those two pages by an experienced judge deserve to be read and reflected on.

F. W. G.

ADDRESS DELIVERED AT MEETING OF TRI-STATE BAR ASSOCIATION AT TEXARKANA, ARK.-TEX., APRIL 23, 1926.

(By Senator THOMAS J. WALSH.)

Senate bill 477, introduced by Senator Cummins, chairman of the Committee on the Judiciary, under consideration by that com-

mittee, if enacted, would authorize the Supreme Court of the United States to prescribe by general rules for the district court of the United States "the forms of process, writs, pleadings, and motions and the practice and procedure in actions at law." It proposes to abandon the system dating from the Judiciary Act of 1789, by which it was provided that "the practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform, as nearly as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." (R. S. U. S. sec. 914.)

Bills of similar import have been pending before the Congress for more than the full period of my service, 13 years. Twice they have been rejected upon full consideration by the Judiciary Committee of the Senate, in the year 1916 and again in 1925. Some engrossing duties rendering it impossible for me to be present at all meetings of the committee in the year last mentioned, it was an occasion when I was absent, without debate, reported favorably, but upon being recommitted action was taken as heretofore indicated. Such reverses neither discourage nor deter the principal proponent of the measure. It defies death. It is being urged now with a pertinacity which commands respect, and with indorsements which threaten seriously to impose the innovation upon the country. Its main sponsor is Hon. Thomas W. Shelton, of Norfolk, Va., a most estimable gentleman and excellent lawyer, a prominent member of the American Bar Association, which has, on his initiative, repeatedly approved his plan of reform without ever having heard an argument against it. He has circularized the State bar associations many of which, on a one-sided presentation, have resolved in favor of it, a method of persuading Senators of certain types much more effective than open debate. Mr. Shelton is an ardent admirer of the practice system of Great Britain, with which he is familiar from immediate contact with it on a number of occasions and which is the model of that he proposes.

It is argued in its behalf that it will bring about uniformity in the practice in actions at law in the Federal courts and simplify the procedure, thus relieving the courts and the bar of the heavy burden they now carry in consequence of controversies that continually arise quite apart from the merits of the litigation with which they are concerned. It is undeniable that it would insure uniformity as between the different States, but it is equally undeniable that it would result in a lack of uniformity as between the practice in the courts of a State and the practice in the Federal courts in the same State. The legislator is concerned with the question as to which variety of uniformity, if such expression may be permitted, is the more to be desired. Uniformity as between the several States would be convenient, no doubt, for Mr. Shelton and

his associates among the members of the American Bar Association who try cases in many States, but the humble lawyer whose practice is confined to the State in which he resides may be pardoned for looking at the matter in quite a different light. It is not to be understood that any accusation is made that those urging the legislation are actuated by consciously selfish motives. Their sincerity and the purity of their purpose is past all doubt. But mankind long ago realized how potent is self-interest to warp the judgment and how easily one inclines to the belief that what is to his advantage is likewise in the public interest. But upon what consideration should the Congress impose the burden of mastering a new practice system upon the multitude of lawyers who never encounter any embarrassment because of a different system of practice in some State other than their own for the accommodation of the relatively few whose practice is more extensive. I am for the one hundred who stay at home as against the one who goes abroad.

Under the existing system the lawyer who has mastered the practice prescribed by the legislature of his State or developed by the decisions of its courts upon the foundation of the common law is equally equipped to institute, prosecute, and try actions at law in the Federal courts, save that in certain particulars arising from the difference in the organization of them, a matter of relatively little consequence, the State practice can not be followed. The task is to be imposed upon him of acquainting himself with another system that may differ radically and is certain to differ in detail from that in which he has been trained, and with which, by experience, he has become intimately familiar. The burden would be a heavy one upon the young and active mind, but it would be oppressive in the case of the practitioner of advanced years wedded to the system learned in his youth, and all would be subject to error that might be serious or even fatal by confusing the requirements of the one with those of the other. Moreover, the rules prescribed would approximate those of the practice at common law, in which case lawyers bred under the code would be perplexed, or they would in general conform to the principles of the code, in which case the common law lawyer would sweat, or they would be quite different from either, harassing everybody.

This consideration, however, is of minor importance. The more grave aspect of the question is that miscarriages of justice without number would undoubtedly ensue until by adjudication doubtful questions of the construction and application of particular provisions of the new system would be resolved. It is a tragedy when a good cause of action is lost by failure to observe some rule of practice or to misconceive the true purports of a statute in relation to procedure, or when a valid and meritorious defense becomes unavailable for a like reason.

Having in mind the innumerable controversies coming before the courts of England involving the construction of the statute of frauds and possibly business losses arising from failure to observe

it, a critic asserted it had cost the King a subsidy, to which it was retorted that nevertheless it was worth two subsidies. Whether the gain to be anticipated from the change proposed will compensate for the loss certain to ensue and for the uncertainty that must vex the business interests of the country while it is being tried out will be considered later.

It is said that the lawyer is even now burdened with the necessity of mastering two systems of practice in as much as that authorized by the State is applicable only so far as may be in the Federal court, and that in many particulars the State system has been adjudged to be inapplicable. A list of the particulars is found in most works on Federal practice with the decisions holding the State practice inapplicable. Though considerable in number, they cover only a relatively small part of the whole field and in most instances the inapplicability is perfectly obvious. No one could be in doubt, for instance, that statutory provisions concerning change of venue from one county to another would not apply to proceedings in a Federal district court. Then Congress has legislated with reference to some particulars of the practice, noticeably concerning the taking of depositions, introducing some diversity, but on the whole it is accurate to say that the practice is the same. This brings me to the consideration of the second argument advanced in favor of the plan proposed.

It is offered as a perfect solution of the troubles of litigants, the bar and the courts over questions of practice. Instead of the cumbersome, intricate and involved systems in vogue, it is said the Supreme Court will lay down a few simple rules so plain in their language that no one can go awry either as to their construction or their application. The practice in equity under rules prescribed by the Supreme Court is pointed to as indicative of what may be expected under the system proposed for the procedure in actions at law. The proposal coming to a vote in 1916 before the Senate Judiciary Committee, consisting of 16 members, a favorable report was ordered. A draft of the report of the majority was made by the present Associate Justice Sutherland, then a Senator from the State of Utah, but minority views were signed by nine of the members of the committee, one having changed his attitude upon a more careful study of the question, reversing the position of the committee. The report of Senator Sutherland dwelt at length upon the admitted evil of the constantly recurring questions of practice. Tables were included showing from the printed syllabi the number of cases in which such questions arose and engaged the attention of the court, appalling in the aggregate, not infrequently of sufficient gravity to control the disposition of the lawsuit. It was assumed that this evil would disappear under the new system, or at least be reduced to negligible proportions. But what ground is there for indulging in any such assumption? Are not the lessons of history against it? Must we not discard all that experience has taught to imagine anything of the kind?

It has generally been regarded as axiomatic in the law that it is beyond human ingenuity or talent to frame statutes or rules suited to every contingency expressed in language concerning the interpretation of which no controversy of substance may arise. The Constitution of the United States is justly extolled for the clarity and the purity of its language, but after the lapse of 137 years since it came into operation the courts are still endeavoring to discover the true meaning of particular provisions of that remarkable work and their applicability or nonapplicability to the facts developed in particular cases. The statute of frauds, after centuries of discussion and adjudications without number, is still a fruitful source of forensic debate. We are not without experience in this particular work of the simplification of judicial procedure. David Dudley Field, a towering figure at the American bar, had the same dream with which the advocates of the measure to which these reflections are directed are enchanted. He, too, deplored the immense loss of energy, to say nothing of rights, attributable to procedural rules and statutes. He, too, conceived that the difficulty could be removed or minimized by the adoption of a few simple rules. The best years of his life were devoted to the most exhaustive study of the problem, as a result of which he produced the New York Code of Procedure, adopted by the legislature of that State through his active advocacy in 1848. The labor involved, as his biographer tells us, was almost incredible. Instead of eliminating questions of practice, it gave rise to such a multiplicity of them that various series of Practice Reports were published for the guidance of the bar and the courts. It became the model for the codes of approximately 30 of the States of the Union. It has undergone several revisions in the State in which it first went into effect, all the work of eminent lawyers of that State, who have labored to remove, as far as possible, the uncertainties of the law and to complete the simplification of the practice. Similar revisions have been made in many of the code States, all having the same end in view, the revisers having the advantage of the numberless adjudged cases. Notwithstanding all this effort, no one conversant with the situation can think that the end has been reached or that questions of practice will not continue perhaps even to the end of time to vex the courts of the States that have thus labored to make simple their procedure. However, the general principles have been measurably settled and doubt has been removed in no end of detail.

A similar development has been in progress in the States that have not adopted the so-called reformed procedure. By statutory enactment and judicial decisions the practice has been settled, speaking generally, to the satisfaction of the bar and presumably of the people. Why should the work of years be discarded and an untried system be instituted to go through the same dreary, disappointing and frightfully expensive process? What reason is there to believe that the Supreme Court of the United States will

succeed where Field failed, or came so near failing, that after three-quarters of a century no inconsiderable number of the States have declined to adopt his code? What member of that august tribunal can bring to the task to be imposed upon it, should the legislation so persistently urged be enacted, a fraction of the fitness for it he possessed? It is impossible to disguise the fact that the Supreme Court could not and would not do the work. It is overwhelmed with the labors now before it. Some radical change is needed to check the flood of cases that get a place on its calendar. It would be obliged to appoint a commission to prepare the draft of a code to the revision of which it would give such cursory attention as its other exacting duties would permit. The proposed law makes no provision for the appointment of such a commission nor for the creation of any fund out of which the members might be paid, or clerk hire or other expenses met. Indeed, I am convinced that the well-meaning proponents of the measure have no adequate idea of the magnitude of the task which would be imposed. They talk and write of "a few simple rules" and evidently contemplate a work in compass approximately that of the equity rules. The equity rules are simply a codification of the rules that obtained in the English courts of chancery, the development of centuries of experience and determinations in those tribunals, with slight modifications to fit the peculiar jurisdiction of the Federal courts. For the resolution of any doubt concerning their construction or to meet situations not specifically and plainly provided for in them, the practitioner goes to the works on English chancery practice or to the American works on equity practice, both resorting to the same original sources, the procedure in the English courts.

The argument for the system proposed proceeds upon the assumption that the equity rules are so simple that he who runs may read and understand and that if they have ever been the subject of controversy the adjudications have been negligible in number. The little book of Judge Shiras on the rules issued a generation ago cited under each a long list of cases in which questions arising under them were raised and determined, and the whole subject of the practice in equity is sufficiently abstruse to justify the publication of perhaps a dozen works on that subject, including the three massive volumes by Daniell. I dare say there are few lawyers here who have not been retained in equity cases in the Federal courts by country practitioners of skill and ability who confessed that the practice in such was a sealed book to them. It is reasonable to conclude that if the innovation which Congress is asked to institute should be sanctioned the practice in the Federal courts in actions at law would become, as the practice in equity is, to no small extent a specialty.

The view that the evil, the magnitude of which was so elaborately set out in the report of Senator Sutherland heretofore referred to, would disappear under a system founded upon rules formulated by judges rather than upon a code or statutes enacted

by a legislature finds no support in the experience of the people of England. A law writer who has taken pains to inform himself apprises us that "between 1870 and 1890 the English courts handed down 4,000 decisions on the judicature rules and the principles intended to be worked out by them." The practice of the State of New Hampshire is controlled by "rules" promulgated by its supreme court. One of these recites that a declaration "will be sufficient * * * which states the facts clearly and concisely * * * if such facts constitute a cause of action." Those familiar with the code system will recognize a striking similarity between this language and that in which under it are defined the essentials of a complaint or the initial pleading by whatever term it is designated. Thus the New York Code prescribes that the complaint shall contain "a plain, concise statement of the facts constituting a cause of action without unnecessary repetition." The language of the California Code is almost identical. That of Ohio says the first pleading must obtain "a statement of the facts constituting the cause of action in ordinary and concise language." How can it be contended that controversies can be avoided as to the sufficiency of a pleading filed under the New Hampshire rule that would arise under the statute of New York, California, or Ohio?

To recur, however, to the scope of the work to be devolved upon the Supreme Court. The slightest reflection will satisfy anyone that it can not be measured by the volume of the rules in equity. Provision must be made for impaneling a jury and for provisional remedies among the more outstanding features of legal as distinguished from equitable proceedings. The 1925 edition of the New York Practice Act of 1921 is a volume of very considerable proportions, 309 pages of which are devoted to the act proper, exclusive of provisions relating to the inferior and surrogate's courts, comprising 90 articles, that dealing with pleadings, embracing the following subheads, viz.: General rules of Pleading, Amended and Supplemental Pleadings, Bill of Particulars, Verification, Complaint, Answer, Counterclaims, Reply, Construction of Pleadings and Objections to Pleadings.

Pick up the code of procedure of any State and find for what an infinite variety of contingencies it has been necessary to provide; for example, the parties to actions generally, necessary or proper, and to actions of a specific character, such as those brought upon promissory notes or other written obligations to recover real estate or by or against trustees. Even more extensive, perhaps, will be found the sections dealing with the limitation of actions and with provisional remedies.

This leads to a further consideration to which apparently the advocates of the proposed reform have given little attention. It is not alone that the volume of the work is great, but it embraces subjects upon which the widest diversity of opinion prevails throughout our vast territory as expressed in the statutes of the various States concerning remedies and remedial rights. Take the

subject of limitations, for instance. As a rule the Western States accord a markedly shorter period within which actions may be begun than do the older and more eastern States. Under the law of Montana an action to recover real estate must be begun within 10 years from the time it accrues; on a written instrument within 8 years and upon a contract not evidenced in writing 3 years. When the Supreme Court frames its rules governing actions at law in the Federal courts, will it adopt the policy of my State touching the time of commencing actions, as evidenced by its statutes, or will it favor that shown by those of your State, or will it prefer the periods prescribed by the laws of Massachusetts or Maryland? This inquiry exhibits the folly of attempting to appy to all our great expanse of territory a uniform system because it has been found satisfactory in Great Britain, the area of which is scarcely half that of the State of Montana.

The chairman of the Committee on the Judiciary who signed the minority report in 1916, afterwards becoming the majority report, as heretofore explained, and who has since been prevailed upon to support the measure under discussion, largely because of the repeated indorsement of it by the American Bar Association and by State bar associations, including, I believe, that of his own State, surprised by representations made to the committee concerning the magnitude of the task of framing rules, declined to accede to the view that they must of necessity cover all the subjects dealt with in an ordinary code of civil procedure, and specifically questioned the contentions that they must comprise the equivalent of a general statute of limitations, apparently taking the view that such a statute is one defining a substantive right which the bill provides shall not be abridged, enlarged, or modified by the rules. It requires no elucidation before this assemblage that statutes of limitations appertain to the remedy and neither confer nor abridge any substantive right, that the period of the statute may be diminished or enlarged without violation of the Constitution of the United States, though it can not be reduced so as, in effect, to cut off all remedy.

The subject of provisional remedies will be found equally controversial. Some States, Iowa among them, as I am informed, refuse to sanction an arrest in any civil action, the ordinary arrest and bail provided for in most States in various classes of cases presenting some element of fraud or oppression, being regarded as violative of the spirit if not the letter of constitutional provisions forbidding imprisonment for debt. In those States in which this remedy is authorized the widest diversity exists touching the class of cases in which it can be resorted to. Will the Supreme Court in the rules it is expected it will be called upon to make adhere to the policy of those States according this particular remedy, or to those in which it is forbidden, and if it is authorized will it extend to all classes of cases in which it may be employed in the

States in which it is regarded with the greatest favor or only to the few in which it is available by the law of my State?

A like difficulty will be encountered in making rules touching attachment. Local statutes in relation to that particular remedy differ widely. In many it is permitted only in actions upon contracts, in others various classes of torts furnish a basis for this remedy, and in still others it is available for any injury resulting from a criminal act. The States differ as well touching the conditions precedent to the issuance of the writ.

They may be grouped into two classes strikingly different. In most of the Western States whose codes of procedure are founded on that of California, the writ may issue in any action to recover a debt due on contract, a simple affidavit affording sufficient proof of the fact as a foundation for the issuance of the writ. On the other hand, in many States, and in practically all the code States whose procedure is modeled upon the New York Code, as is well known, the writ can issue, except the defendant be a nonresident, only upon verified averments of fraud, perpetrated or in contemplation, or prospective departure from the State to avoid service. In not a few the statute is not satisfied with a verified statement of a fraudulent purpose, but the averment must be supported by the evidence. Which of these various classes of statutes will find a place in the rules? I am told that the system in vogue in Montana would be regarded as intolerable in the State of New York.

Take the subject of assembling a jury for the trial of a case. That involves, in the first place, from what class jurors may be drawn, whether women, for instance, may be called, the qualifications and disqualifications of jurymen, and exemptions from service; the manner of drawing, a field in which great diversity exists as between the several States, the grounds for excusing from service, and many other details. The task to be set the Supreme Court is not only appalling in its magnitude, but I venture to assert, in view of the radically different views of the bar, as exhibited in the statutes of the various States, the predilections arising from training and experience, it is a well-nigh impossible task.

Let anyone pick up or run through one of the modern works on practice and procedure, the two volumes by Kerr on the codes of the Western States, or a like treatise by Poe on the Code of Maryland, or let him examine the New York practice act, article by article, or the Code of Civil Procedure of California, or of Montana, bearing in mind that these are the results of efforts to make complete provision for the proper presentation of causes to the courts in the smallest possible compass and in the most direct and explicit language, and he can not fail to see the unwisdom of imposing upon the Supreme Court the duty of framing a code that is or ought to be reasonably satisfactory to Massachusetts and Kansas, Michigan and Texas, New Jersey and Louisiana, as well as the utter hopelessness of its discharging the duty to the satisfaction of itself or almost anyone else.

I inquire again, what is the substantial gain to be anticipated from this departure? Why does anyone want uniformity in the practice in actions at law in the Federal courts, except it be, as heretofore suggested, the lawyers whose practice extends over more than one State, a negligible number. It is offered in this connection that when the system comes into vogue the States, respectively, will conform their system to that prevailing in the Federal courts and thus uniformity will obtain throughout the Nation. One can understand how uniformity in respect to many subjects falling within the domain of substantive law is to be desired, and the work of the American Bar Association in promoting such uniformity touching negotiable notes, sales, etc., is eminently praiseworthy, but with respect to procedural law variety is a matter of relatively little consequence. But upon what ground is the prophecy based that the States will conform their practice to that prescribed by the rules of the Supreme Court? The lessons of experience must be disregarded to indulge any such belief. Field entertained the hope that this code, or something modeled upon it, would come into universal use. I have never been able to understand why it has not. Having been bred under it, I am convinced it approaches as near simplicity and perfection as any mere human work may. But I know that to a multitude of lawyers, among the most eminent and learned at the American bar, it is anathema and that a very considerable number of States will have nothing of it. How then shall we harbor the idea that, declining to accept the work of a great American lawyer, they will cordially take to their bosoms a system modeled upon the British reformed procedure, the authors of which not only acknowledged expressly their indebtedness to the work of Field, but paid him the compliment of devising a system in its essential identical with his, the fact that it consists of rules established by the judiciary instead of statutes emanating directly from the lawmaking branch of the Government being unimportant.

Hepburn's work on the Development of Code Pleading gives the history of the agitation for the abandonment of common law pleading carried on simultaneously in the British Empire and the United States, and having dealt with the rapidity with which the example of New York was followed for a time until conversions ceased, when conditions became static, he discusses the codes of the British Empire in their relation to codes of the United States, dividing the subject into two sections, the first canvassing The English Code, the second, Other Codes of the British Empire, a subdivision of the first section treating of The Suggestive Resemblance between English and American Code Pleading. The text declares "Their general purpose and main results considered, the English and American system of pleading are in remarkable accord." A writer in the *London Law Magazine and Review* for 1879 says that "anyone who has any knowledge of the two systems (that of New York and of England) knows how closely the latter system follows the former in theory, nomenclature and sub-

stance." The English statute of 1875 numbers 100 sections, but it is accompanied with rules numbering 63, embracing 453 sections dealing with the subject of pleading, these having the authority of law, pursuant to the statute which authorized order in council on the recommendation of certain judges for regulating the pleading, practice, and procedure of the High Court of Justice and Court of Appeal, and generally for regulating any matters relating to the practice of the said courts.

It will be noted that the rules emanate from the privy council, a body having wide legislative powers, though upon recommendation of the judges who were, however, empowered to alter the same or to make new rules. The act of 1873, however, provided that all rules made pursuant thereto were to be laid before Parliament within 40 days after being made, if it should then be sitting; or, if not, within an equal period after its next meeting, when it might annul them, Parliament retaining, in effect, a veto power.

It has been urged in behalf of the measure to which these remarks are directed that it would relieve the practitioner, at least in the Federal courts, from the labor and embarrassment occasioned by the constant tinkering of State legislatures with the practice code or statutes. It is a tendency of our day, giving occasion to no end of criticism, to invoke the interposition of the Federal authority whenever possible to meet any situation arising from either the action or the inaction of the States. It is noticeable, however, that while there is a general disapproval of the absorption by the Federal Government of functions long regarded as peculiarly appropriate to the States, it is, as a rule, voiced by some one who has in mind a measure or measures to which he is opposed on other grounds, not legislation proposed or enacted in which he takes a sympathetic interest. However that may be, it seems a queer basis for Federal action that the States are unstable in their action in reference to this particular subject.

I think it quite likely that a very marked stability would characterize the rules system were it ever instituted. It is rare that one is elevated to a position on the Supreme Court until he has passed the meridian of life when, according to all experience and observation, a growing conservatism is to be anticipated. The judges would have no opportunity to know of the operation of the rules except as they should be reported by those coming into closer contact with trial work. If judges are to be intrusted with this function, heretofore regarded as legislative in nature, it would seem to be more wisely reposed in the district judges rather than in the justices of the Supreme Court. The history of the equity rules leads to the conclusion that changes would be made with difficulty. They were continued in force without substantial change from the form in which they were originally promulgated for nearly 40 years after they were discarded in England and until their very language had become obsolescent and archaic. No perfect system has yet been devised. The New York practice act has

undergone three general revisions, and the English rules an equal number.

Another merit said to be found in the proposed system is that conflict in decisions as between the several States on questions of practice arising under codes or statutes substantially identical or strikingly similar would be avoided or corrected. Quite likely a conflict over the interpretation of the rules between the circuit courts of appeals would be resolved by the Supreme Court, and it is probable that if a State statute had not been construed by its court a decision of the United States Supreme Court on a rule prescribed by it, in substance like the statute, would be regarded as highly persuasive by the court of the State confronted with the necessity of interpreting its law, and so uniformity would be provided. But why should the Supreme Court be pestered with controversies over mere questions of practice? Happily it has relatively few such under the prevailing system. It accepts without question the construction given by the highest court of every State to its statutes, both procedural and of substantive rights and duties. It is only in the event that there are no local adjudications that it is called upon to resolve for itself questions of practice in actions at law. The system it is proposed to substitute would bring before it innumerable questions of practice, at least while the innovation is in the experimental stage. They would not be limited in number by the conflicts that might arise as between the intermediate Federal courts. One or more might conceivably be presented in every law case making its way before the overburdened highest court. It would, of course, be the final arbiter in every controversy over the rules, assuming that the case in which it arose reached the Supreme Court.

Restiveness under the law's delay, a source of complaint that has survived at least since Shakespeare's time, comes to the aid of the proposed legislation, particularly as it is understood it is suggested by, if not modeled upon, the system prevailing in Great Britain, where it is popularly believed, as the fact no doubt is, the wheels of justice move with greater celerity than with us. There is a widespread belief that opportunities are presented and very generally improved to procrastinate in judicial proceedings by resorting to senseless technicalities required in abundance by our procedural law, badly in need of revision. Without more careful study than might be expected of lay writers, the press, on the assurance that all such would be removed, or at least reduced to a minimum by the reform proposed and thus the disposition of causes be expedited, has, so far as it has been noticed at all, quite generally approved it. Even the legal periodicals have, as a rule, contented themselves with caustic references to Members of the Senate who have deemed it their duty to oppose the legislation, comprising, as indicated, a majority of the members of the Committee on the Judiciary, notwithstanding the mutations it has undergone in 13 years, rather than to give their readers an analysis

of the measure with a discussion of the objections to which it is said to be subject. Though they have been in form available at any time within the past 10 years, I have seen nowhere in any law journal any copy of the views of the majority of the committee, or even any review of the reasons impelling them to the course they have pursued. It is quite likely that to some extent the expedition with which causes are disposed of in England is due to the substitution of the reformed procedure for the old common law practice. It was said with that end in view that the change was instituted, but it would be a mistake to assume that any part, at least any considerable part, of the greater dispatch which distinguishes their court proceedings as compared with ours is attributable to the slight difference between their code system and our code system, or specifically to the fact that in the main their practice is governed by rules, while ours is controlled by statutes. One may easily fall into error in instituting a comparison of the rapidity with which justice travels here and there. They have a system of "county courts," the practice in which approximates that of justices' courts in America, though they entertain causes involving much larger amounts than those over which our justices have jurisdiction. Their competency extended originally only to cases involving sums not greater than £20, but latterly this limit has been raised to £500, including some causes of an equitable nature, and they may entertain jurisdiction regardless of the amount involved with the consent of the parties. It might be advisable to copy this feature of their system generally, indeed courts similarly empowered are quite common in municipalities in this country, but their procedure, said to be "rudimentary," does not concern us in this discussion, neither is it of consequence that their proceedings are characterized by the utmost dispatch.

It is surprising how quickly the American mind, in our day at least, turns to the legislature for relief from every ill, actual or fancied. The courts are dilatory, justice is delayed. Remedy, change the law. Now I venture to assert that most of whatever difference obtains in respect to the time ordinarily required to dispose of cases in the courts of America and of England arises from difference in the habits of the bench and the bar. Delays of the most exasperating character ensue with us because there are not judges enough to do the work. Indubitable evidence was submitted recently to a committee of the Senate that the Federal court for the southern district of New York is three years behind with its work, and that at least three and perhaps five additional judges should be assigned to that district. But assuming ample provision in that regard is made, we should still not move as rapidly as the English. I was told in London last summer by the attorney general that it is rare that the first 12 jurymen called into the box are not sworn to try the case, both sides waiving their right to question them on the voir dire. Days and sometimes weeks are occupied with us in selecting the jury in any case which has aroused

public interest or been the subject of general discussion. It took a day to secure a jury for the trial of Senator Wheeler at Great Falls a year ago, and predictions were ventured that it would take a week.

I listened during an afternoon to the trial of a case before an English judge and heard but a single objection to the introduction of evidence, on which the judge ruled promptly, though the point was important and by no means clear. The information was given me that the most skilled lawyer at their bar rarely makes an objection to the admission of evidence unless a vital question is raised by the tender, and that he often acquiesces in the admission of damagaing testimony that might be excluded upon objection, his theory being that the cause of his client would be likely to suffer more from raising the objection than from the objectionable testimony. Upon like considerations counsel refrain, as a rule, from interrogating the jury or exercising challenges against them. The impression was left upon my mind that the formation of these habits was stimulated from the bench. I am sure much might be done by the presiding judge to cut short protracted inquiries addressed to jurors on the voir dire or dreary cross-examination. I am disposed to think that our more dilatory methods are in no small measure attributable to the example of the trial of Aaron Burr before Chief Justice Marshall, familiar to every cultured American lawyer. The defendant who had been held to answer was permitted to conduct the most searching and exhaustive examination of those called to serve as grand jurors to investigate the charge, as a result of which a number were excused, the proceeding being punctured with eloquent speeches from counsel concerning the gravity of the charge, the circumstances under which it was brought, with veiled references to the political considerations underlying or involved in it. As the trial proceeded there were innumerable interruptions, long debates, and recesses to permit the distinguished presiding judge to reflect upon the arguments, study the authorities, and write his opinion.

Such information as I have leads me to the belief that the judges of the appellate courts of Great Britan do not deliberate upon the cases submitted to them quite so long as do ours. In December, 1924, there was submitted to the Supreme Court of the United States an appeal from the order of a district court in the State of Ohio discharging from the custody of the Sergeant at Arms of the United States Senate one Mal Daugherty in custody for alleged contempt of that body in refusing to appear before one of its committees in obedience to a subpœna issued by it and served upon him, the legal question at issue being the power of either House of Congress to compel the attendance of witnesses before it or any of its committees conducting an investigation by its order or authority. The case is still held under advisement. Meanwhile one Harry Sinclair, indicted in the District of Columbia for a like

offense, refusing to testify, interposed a demurrer advancing the same contention, namely, that the Senate has no compulsory power except in connection with its quasi-judicial duties, and was permitted to take a special appeal to the District Court of Appeals from an order overruling his demurrer, which was argued and submitted in February, 1925. It is still before that court, which, it is understood, is awaiting the decision of the Supreme Court in the Daugherty case. It need not be said that the law is at fault in the cases mentioned except it be the law that permits an appeal from the interlocutory order sustaining a demurrer. The question involved is one of surpassing importance, not free from doubt, and the court ought not to be hurried in ruling upon it. It would probably be more promptly determined in many countries, perhaps even in England, but the belief is general that the court will proceed as expeditiously as the difficulty of the case and the state of the business before it will permit.

Mention is made of the subject not only to demonstrate that all delays are not due to defects in the laws, but as well because some unmerited criticism in connection with the prosecutions referred to have been directed against the Department of Justice and the officers charged with the conduct of them.

It may be rash in anyone to question the constitutionality of the legislation that is the subject of these remarks in view of the long acquiescence in the act under which the rules in equity were promulgated. Were it not for that enactment, I should, with much confidence, submit to this assemblage of lawyers that the bill in question contemplates a delegation of legislative authority violative of the Constitution. In view of the acts of the legislative bodies of England and America, as far back as we have any record of their proceedings, it must be conceded that statutes regulating the procedure in courts of justice fall within the grant of general legislative authority. If it is a legislative rather than a judicial function, how can it be delegated to any court, particularly how can it be delegated to any Federal court, the jurisdiction of which is limited by the Constitution? Certainly the legislation under consideration falls entirely without the rule in *Field* v. *Clark* (143 U. S. 670). Upon what theory can the delegation of authority to the Supreme Court to promulgate rules having all the force of statutes in relation to the practice, not in that court but in other courts, be justified that will not equally justify any delegation of legislatve authority to that tribunal, at least any authority to enact rules in relation to the courts, as, for instance, what inferior courts should be constituted, what jurisdiction they shall have, how causes shall be removed from the State to the Federal courts, what salaries the judges shall have, and by what officers the courts shall be attended. Unquestionably every court may make its own rules not inconsistent with statutes, and statutes unreasonably restricting the action of a court within its constitutional grant of power may be

disregarded as unconstitutional. At least it has been so held. It is perhaps not open to doubt that if a court were created either by constitution or statute and no provision were made in either by which its jurisdiction was to be exercised, it would have the power by rule to prescribe how a suitor must appear and present his cause, how the defendant may be required to appear, how the issue should be made up and the trial proceed. It has been the universal belief, however, that such right yields when the legislative authority acts. It will be borne in mind, however, that this is no proposal to empower the Supreme Court to make rules governing the practice in that court, but to make rules governing the practice in other courts.

The Parliament of Great Britain may delegate its authority to some other agency. It confers wide powers, obviously legislative in character, upon the privy council, but Congress can not thus abrogate the powers nor escape the duties imposed upon it by the Constitution. Moreover, the court of King's Bench since time immemorial exercised a supervisory control over the other courts of the Kingdom. By the constitutions of many States the highest court thereof was by express language therein granted such supervisory control over the inferior courts thereof. This grant has never, so far as I have been able to learn, been held to warrant the promulgation of rules governing the practice in such lower courts, but it might conceivably be construed to justify such an exercse of authority, at least in the absence of statutory regulation. But the Constitution vests in the Supreme Court of the United States no such authority, and I can find nothing in our organic law empowering the Congress to confer it. Indeed, that court acquires none of its authority from Congress, though its authority may be limited by Congress, and it has always yielded to the enactments of Congress concerning the manner in which and the conditions under which its jurisdiction may be exercised.

I do not care, however, to buttress my opposition to the proposed legislation by assailing its constitutionality. In my judgment it is unnecessary, would aggravate the evils to remove which is its purpose, would introduce confusion worse confounded, and result disastrously to our intricate and delicate commercial machinery, even if it were possible to frame such a code as is proposed that would be accepted by the bar and the business interests of our far-flung Union.

MISCELLANEOUS CLIPPINGS.

JUDGE GRANT'S DRAFT STATUTE TO LIMIT DIVORCES.

The *Boston Traveler* of September 4, 1926, printed a "Symposium" on the question "Should the number of divorces to a person be limited." The following contribution seemed both pertinent and entertaining.

"A MODEL STATUTE ALLOWING ONLY 2500.

By ROBERT GRANT.

"Any marriageable citizen of the United States, man or woman, shall be allowed to accumulate during his or her lifetime not more than fifty wives or husbands from whom he or she has been previously divorced in any one state of the Union, not including Paris, France.

"But this shall not be construed to mean that he may not acquire fifty wives or husbands from whom he has been previously divorced in every one of the forty-eight states of the Union, including South Carolina, where there are no divorces but only hypocrisy, and the District of Columbia; or an aggregate of 2500 wives or husbands more or less.

"And further, in order to protect the plain people of the United States who cannot afford to travel to Paris, France, it is further provided that any divorce granted abroad to a citizen of the United States shall reduce by 20 the aggregate of 2500 wives or husbands previously divorced allowed to every freeborn marriageable man or woman of the United States divorced within the jurisdiction of the United States; and whereas gentlemen prefer blonds and many ladies take somebody else better on short acquaintance, it is hereby further provided that in every leap year there shall be allowed to every wife or husband in the United States one extra divorce, thereby increasing the aggregate of divorces which shall be allowed within the United States to any marriageable person to an aggregate of 2500 husbands or wives more or less plus one for every leap year during longevity."

THE OTHER WAY OF AMENDING.

(From the Boston Post of June 13, 1926.)

In the vernacular of modernity, Louis A. Cuvillier of the New York Assembly "started something" when he wrote Senator Borah a letter pointing out that 28 States, two-thirds of the total, had asked for a constitutional convention, leaving only four more neces-

sary for a gathering that could amend the Constitution, provided the convention's changes are ratified by three-fourths of the States.

The convention way of amending the Constitution is certainly constitutional, although probably nine-tenths of our people are unaware of any method of changing the ancient document than that by the proposal of amendments by Congress and the action of the several State Legislatures upon it. The reason why this other method is so unfamiliar is that it has never been undertaken since the founding of the republic. But it is a lawful way, nevertheless. Article V. of the Constitution reads:

> The Congress, whenever two-thirds of the Houses will deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by Congress.

The weak part of Mr. Cuvillier's proposal is that the legislative requests of the 28 States he cites have been scattered over such a long period of time. Here is the list and the dates of their action:

Arkansas	1903	Missouri	1907
California	1903	Montana	1907
Colorado	1901	Nebraska	1903
Delaware	1907	Nevada	1907
Idaho	1908	New Jersey	1907
Illinois	1903–1909	North Carolina	1907
Indiana	1907	Oklahoma	1908
Iowa	1907–1909	Oregon	1901–1909
Kansas	1907	Pennsylvania	1901
Kentucky	1902	South Dakota	1908
Louisiana	1907	Texas	1899–1901–1908
Michigan	1901	Tennessee	1901–1906
Minnesota	1901	Utah	1908
Wisconsin	1908	Washington	1903

The question is, can these 28 applications be considered as having mass enough, so to speak, to warrant the addition of four more for the making the call of a constitutional convention mandatory on Congress? It is a very neat problem in constitutional law and precedent, and we shall not undertake the task of trying to solve it. But it opens up enormous possibilities.

ABUSE OF OPPOSING COUNSEL.

In *Royal Arcanum* v. *Green*, 237 U. S. 531 at page 546, the Supreme Court of the United States said—

"Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in *Green* v. *Filbert*, 137 U. S. 615, which we hope may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

A MODERN METHOD OF DEALING WITH MINOR OFFENCES IN CONNECTICUT—WHY NOT?

Sometime ago the following news item appeared in the *Boston Globe:*

East Hampton, Conn., Feb. 12—Justice of the Peace Frederick E. Duell held court over the telephone yesterday, when three persons living in Middle Haddam, who had been arrested for failure to license their dogs, told the justice over the wire that they could not come to court because of the bad roads.

The accused persons who told the justice of their predicament by telephone, were each fined $1 and costs and agreed to mail in the amount of fines and costs, totaling $8.32 each.

ONE JUROR'S EXPERIENCE.

(Reprinted from the Boston Herald.)

To the Editor of The Herald:

In regard to our courts and jury system, I want to write that I was drawn on superior court civil jury June 1, 1926. As I am a traveling salesman and travel New England all the time I had to give up my route and lose several hundred dollars in order to do jury duty.

I don't object to this, but what I do object to is this: During the whole month I only sat on one case. The first one I was called on I could not serve because I was a stockholder in defendant corporation. The second time I was called I served. The third time I was called I was challenged by plaintiff counsel and did not serve.

Now, then, after giving up my valuable time and 30 other men doing the same I do not see why we should not have been worked and not had three-hour dinner hours and been idle one-half the time. One week in particular about 15 of us were idle the whole week, in fact there were always about that many doing nothing. I did more loafing than I have ever done since I was in the grammar school and had long vacation. I cannot see why I should not have worked from 8.30 A. M. until 5.30 P. M., instead of sitting around one-half the time. Seems to me when I came off one case I should have been put to work on another.

Understand, please, this letter is no reflection on the judge or court officials who were in no way to blame for the system which seemed to be in vogue. The judge certainly worked hard. He was on the job all the time while 50 per cent. of the jury were idle.

By taking some clerical work up to the court house I managed to have something to do some of the time. It seemed to me no wonder they were two or three years behind on cases. I should think they would be.

Perhaps I have the wrong viewpoint of jury duty, but it is always distasteful to men to be hanging around and idle. One day I sat an hour on a bench on the Common to fill in time.

While I accepted the juror pay at City Hall I felt ashamed to take it.

FREDERICK H. DOW.

WEST ROXBURY, July 8.

THE PROBATIVE VALUE OF EMPHASIS IN THE VERNACULAR

Extract from the Opinion in Marcienowski v. *Sanders, 252 Mass. at p. 67.*

"The question is, whether upon the evidence most favorable to the plaintiff the jury were warranted in finding that the operation of the automobile under the circumstances was so blameworthy as to constitute gross negligence.

"The testimony of the witness Morrissey, that the defendant said on the day following the accident that at that time, 'Well, we were going like Hell,' was not a description of a fact; it did not tend to show the rate of speed; it was of no more significance than if the defendant had said that they were travelling rapidly or very fast. It had no tendency to show how fast they were going or what was excessive or unreasonable."

Sed quaere?

USING THE ATTORNEY-GENERAL.

(From the "Springfield Republican" of June 27, 1926.)

It is a matter of "serious doubt whether county commissioners fall into the class of 'state departments, officers and commissions' to whom the attorney-general is the duly-constituted legal adviser," so Atty.-Gen. Jay R. Benton informs the local county commission. His statement is part of his answer to the petition of the commissioners for his opinion in regard to the legality of an associate county commissioner acting on matters of redistricting.

Mr. Benton then goes on to say that in the particular instance of redistricting, since it involves a constitutional process covering the entire state, he feels at liberty to give his personal views and he does so. But there is definite indication that the county board is not free ordinarily to solicit his legal advice, especially in matters involving this county alone.

Little attention has been given locally to this point, though Mr. Benton laid stress on it. It is important, for the county board must from time to time face legal problems in which the assistance of the attorney-general would be valuable, just as it has been in the special instance of redistricting. It might not be a bad idea to move for the extension of the law to cover county commissions, especially as there are such frequent relations between the state and county in regard to government highways, corrective institutions, courts, dams and other matters.

A CANADIAN REFERENCE TO MASSACHUSETTS AFFAIRS.

RUDES VERITES.

(From La Revue du Droit [Quebec].)

M. le Gouverneur Fuller, du Massachusetts, dans un récent message à la Législature de cet État (cf. MASSACHUSETTS LAW QUARTERLY, janv. 1926, pp. 47–52), a exprimé sur divers sujets les vues profondes d'un véritable homme d'État. Signalant l'accroissement de la criminalité aux États-Unis et la faiblesse de la répression du crime, il a donné aux législateurs de l'État du Massachusetts la direction que voici, et à laquelle tous es hommes de bon sens applaudiront:

". . . Misdirected sympathy and the highly developed expertness of penologists, reformers and parole advocates who have lost sight of the rights and protection of the public and concentrated on the rights and reformation of the criminal, have aided to increase crime.

"Prompt, vigorous and effective prosecution would speedily make crime less prevalent. Apprehension of the criminal must be certain; prosecution must be inevitable; and adequate punishment must promptly follow if the criminal law is to be restored to the respect of the people and made effective for their protection. There is law enough on the statute books of Massachusetts to enable any judge to convict wrongdoers. Crime flourishes not because of lack of law. The trouble lies deeper than that. The doctrine has been preached far and wide that when a crime is committed the thing to do is to try to reform the wrongdoer rather than to inflict punishment for the crime. It is punishment for the crime—swift and sure—that is the best protection for society. If during that process reform takes place, well and good, and I believe it is more likely to take place under those conditions than through coddling and sympathy. Another factor that interferes with swift and sure justice is the difficulty the courts have to find juries that convict. That same sympathetic consideration for the man in the prisoner's dock that the intellectuals have advocated, through penology and psychiatry, makes it very difficult for the district attorney to secure convictions."

Il est question, au passage ci-dessus, du procès par jury et de la difficulté, de plus en plus considérable, de trouver un jury ferme et conscient de ses graves responsabilités. A ce sujet, notons que, dans deux États américains, le Maryland et le Connecticut, il y a une tendance très prononcée à mettre de côté le procès par jury au criminel, sauf dans les cas les plus graves, les cas de peine de mort par exemple. Ainsi, à Baltimore, en 1924, sur 4,499 procès criminels, on n'a eu recours au jury que pour 180 cas. A Hartford, 70% des procès sont jugés sans jury.

Pour en revenir à M. le Gouverneur Fuller, un mot de son récent message est encore à son honneur. Il a mis en garde le législateur contre une surabondance de législation. "I believe in economy of legislation," a-t-il dit, ajoutant:

"I believe in the abandonment or repeal of unnecessary laws to the end that we may have a simplification of the laws of the Commonwealth. Laws that are unnecessary, archaic or not essential should be repealed. Multiplicity of laws complicates and makes increasingly difficult the administration of justice and makes for disrespect for all law."

Voilà un esprit réaliste et qui sait dire les choses comme elles sont!

AN ENGLISH COMMENT.

(From the Solicitors' Journal of July 24, 1926.)

"The public agitation in regard to the administration of the criminal law in Massachusetts, which has been going on for some time, has recently culminated in a more or less official discussion of the subject before the Judiciary Committee at the State House. The May issue of the MASSACHUSETTS LAW QUARTERLY contains a report of the substance of such discussion, and we can only say that the matter makes most interesting reading."

"THE SOLICITORS' JOURNAL."

The editors of the English *Solicitors' Journal and Weekly Reporter* have, for some years, shown an appreciative interest by their references to, and occasional quotations from, the MASSACHUSETTS LAW QUARTERLY and, as our readers will remember, we have frequently quoted extracts from this English periodical. But, in addition to this editorial exchange of complimentary references, —in view of the growing importance of a better understanding of the legal systems on both sides of the water, we take this occasion to call the special attention of our readers to the *Solicitors' Journal.*

It is a weekly publication primarily for the active English practitioner and, consequently, contains much current information in regard to general practice, including the problems arising under the new law of property acts. There are also summaries, or fuller reports, of recent cases of importance in different branches of the law and critical notes or more extended articles on various subjects. For those of our readers who are interested to keep in touch with the current English practice this periodical seems peculiarly adapted for this purpose. It is readable, useful, interesting, and often entertaining. Any one wishing a specimen copy can doubtless obtain it by writing to the editorial offices, Fetter Lane, London E. C. 4, England. Every well equipped public law library should have it on hand.

F. W. G.

PRACTICAL INCIDENTS IN THE ADMINISTRATION OF "GOVERNMENT BY SIGNATURES".

It is a familiar saying that "Eternal vigilance is the price of liberty," and our recent experience in Massachusetts with "government by signatures" under the primary system of nominations and the initiative and referendum illustrates the fact that the price of liberty, like other prices, has risen because more vigilance is needed than ever before. Some of these experiences are collected here as an aid to reflection for the information of those interested in our government.

First, the nomination papers of a candidate for district attorney in Suffolk County were naturally and properly thrown out because without his knowledge some of his supporters adopted the interesting and convenient practice of having nomination papers signed *in blank*.

In the *Boston Transcript* of September 20, 1926, appeared the following account.

The Interesting Practice of Wholesale Political Forgery

By Wendell D. Howie.

As a direct result of the evidence in his possession showing that wholesale forgeries on the nomination papers of candidates for political office have so increased as to make a farce of the direct primary laws, Secretary of State Frederic W. Cook is preparing a recommendation to the General Court for legislation which will make the candidates personally responsible for the genuineness of the signatures, under penalty of a jail sentence. Positive evidence of the forgeries is contained in the nomination papers filed this year, and so brazenly have they been made that no expert is required to discover them.

The situation was publicly disclosed during the hearings before the State Ballot Law Commission, when , chairman of the State Committee, was protesting the nomination papers of for , and for . Mr. was compelled by his party leaders to drop his protests, but not before he had clearly shown numerous forgeries on the papers of both these candidates—and he said he could easily have proved a sufficient number to keep their names off the ballot, which would have saved the party a great deal of trouble, as subsequent events have shown.

, handwriting expert, was employed for Mr. to give evidence concerning the signatures on the nomination papers. The expert testified that in a great many instances several signatures were in the same handwriting, contrary to the laws governing nomination papers. It is not generally understood, perhaps, that a person may not authorize another to sign a nomination paper, except in rare and specific instances. The law states very clearly that "Every voter signing a nomination paper shall sign in person . . . but any voter who is prevented by physical disability from writing or who had the right to vote on May 1, 1857, may authorize some person to write his name and residence in his presence."

AROUND THE TABLE

The evidence is not confined merely to the nomination papers of and . It is to be found in a large number of cases and is being found with increasing frequency on initiative and referendum petitions as well as nomination papers. It may sound strange, but to anyone who has had the long experience of Mr. , there is a romance concealed in a nomination paper filed with signatures.

For instance, Mr , by looking over a paper, has been able to decide that the names were all written in by about eight men or women, seated in a room about a large table. In front of them are voting lists, with every eighth name checked off as the name to be written in by one of the signers. After the name is written on the paper the sheet is passed along, and gradually goes around the table and back to the first signer.

By following the sheets carefully anyone can see that every eighth name is in the same handwriting. As the process continues, it will perhaps be noticed that suddenly the same handwriting appears on every seventh signature. "One of the signers has gone to get a drink of water," the expert declares. Later, when noon approaches, the same writing may appear more frequently, say once in every four signatures, indicating that the signers are going to lunch in shifts.

Unfortunately, when the names are filed for certification, with local election officials, the only question to be passed upon is whether the name is that of a registered voter—not whether it is the voter's bona fide signature. Several years ago a city clerk called Mr. Cook on the telephone and said he had some referendum petitions in front of him, for certification of the names, and that clearly every name had been signed by the same person. He said further that some of the names were of the most prominent people in the city, that he had telephoned to a few of them and had found that they never had seen the papers. The city clerk was instructed that his only duty was to signify that the persons whose names appeared on the papers were registered voters.

A FLAGRANT CASE

This case was so flagrant, however, that Mr. Cook appealed to the Legislature in 1923, and the following bill was enacted into law:

"Whoever falsely makes or wilfully alters, defaces, mutilates, destroys, or suppresses a certificate of nomination or nomination paper, or letter of withdrawal of a name from such paper, or an initiative petition or a petition for the submission of a question to the voters, or unlawfully signs any such certificate, paper, letter or petition, or files any such certificate, paper, letter or petition, knowing the same to be falsely made or altered, shall be punished by imprisonment for not more than one year."

Theoretically, this statute was good. Practically, it was worthless. Under it the forgeries and irregularities have continued unabated—have in fact, increased—because it is next to impossible to prove who the guilty person is. To meet this objection, therefore, Mr. Cook believes the responsibility should be fixed directly upon the candidate in the case of nomination papers, and on the person who files in the case of initiative or referendum petitions.

It may be argued that this would be a harsh and extreme measure, but unquestionably it would put an end to the wholesale forging of signatures. Some responsible person, either the candidate or a close representative, would look the signatures over carefully before filing them, under such a law, and where more than one name was obviously in the same handwriting, they would either make certain that the offending signature was removed or that particular paper not filed.

The direct primaries at best are a farce and the General Court will probably find a concerted movement on for a change at the next session. Even if it is decided to experiment with it for a few more years, some of its most glaring deficiencies probably will be remedied, and the question of signature certainly needs attention. At the present time there are a number of professional signature procurers doing business in Massachusetts. Most of them are paid fifteen cents for every name they obtain on a nomination paper or initiative or referendum petition. Few of them have any scruples as to the method employed.

RECENT OPINIONS UNDER THE I. AND R.

DISCUSSIONS OF THE OPINION IN ANDERSON V. SECRETARY OF THE COMMONWEALTH, ADVANCE SHEETS 807 RENDERED APRIL 9, 1926.

An initiative petition for a law to permit Sunday sports, at which admission fees were charged, was submitted under the 48th amendment by ten signers to the Attorney General, who prepared an appropriate description to be used on the petitions and on the ballot and then added the following certificate:

> "BOSTON, MASS., *September* 17, 1924.
>
> "I hereby certify that the annexed initiative petition being a petition signed by Joseph F. Conway and nine other qualified voters for the enactment of an act entitled 'An Act to permit certain sports and games on the Lord's Day,' sets forth a measure which is in proper form for submission to the people; that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years preceding the first Wednesday in December next; and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent.
>
> JAY R. BENTON,
> *Attorney General.*"

Signatures were collected and the legislature having failed to adopt the law the question arose whether the Secretary of the Commonwealth should place the question on the ballot. A petition was filed by ten citizens for a writ of mandamus commanding the secretary to refrain from putting the question on the ballot. A petition for certiorari was also filed to review the certificate of the attorney general.

The ground of both petitions was that such a law to allow professional sports on the Lord's Day was within the clause of the amendment which excluded certain matters from the "Initiative". That clause begins, "No measure that relates to religion, religious practices or religious institutions or the operation of which is restricted to a particular town, city or other political division, etc. . . . shall be proposed by an initiative petition." With the merits of this question we are not now concerned. It is fairly debatable. It might perhaps be decided either way without violence to the

language of the amendment as may be seen by inspection of the able arguments in the briefs of Messrs. Harold S. Davis and Samuel W. Mendum for the petitioners and Assistant Attorney General Weston for the respondent. The question is a serious one of constitutional interpretation. The constitutional convention of 1917 which framed the I. and R. amendment debated its various clauses for four months. The debates fill more than 1,000 pages of Volume II of the Convention Debates. The subjects covered under the "excluding" clause were long, sharply, and earnestly debated by men who were giving the best that was in them to protect the best interests of the people of the Commonwealth.

The court declined to pass on this question, however, for the following reasons:

> "While no measure that relates to religious practices, or religion, or religious institutions can be made the subject of an initiative petition, the Attorney General is required to certify that the measure is in proper form. Art. 48, The Initiative, §§ 2, 3. A petition is not in proper form if it falls within the exclusion. The Attorney General, therefore, is to pass upon this question before making his certification of approval or disapproval. This power is expressly conferred upon him in unequivocal words. The question, whether the preliminary requirements have been complied with, is for him to determine and his decision, in the absence of bad faith, is final. It can not be set aside by this court which can interpret, but can not override the organic law.
>
> . . .
>
> "It follows that the petition for mandamus in the first case, to restrain the Secretary of the Commonwealth from submitting the measure to the people, and the petition for certiorari in the second case, to quash the certification of the Attorney General, must be dismissed."

During the constitutional debates on the I. and R. while the convention was in session, it probably never occurred to the members, and until this case we had never before heard it suggested in or out of the convention that the attorney general's certificate on *these far-reaching questions* should be beyond the control of the Supreme Judicial Court. Believing as we do that unless it is reconsidered and modified the opinion threatens the stability of our constitutional structure, we think it should be respectfully, but closely, analyzed and discussed in order that we may see where we are going in the line of judicial interpretation of the constitution.

The first fact to be noticed is that the case was argued on March 26, 1926, and the opinion filed on April 9, only fourteen days later, part of which time was occupied in hearing other cases. So sudden a decision of an important constitutional question calling for careful study is unusual in Massachusetts and suggests that the pressure of business on the court, especially during the sudden illness of the chief justice, entered into the preparation of the opinion to an extent which deprives it of the usual force as a precedent. This is particularly true as the opinion is not a reasoned opinion. The reasoning is limited to the statement that as the attorney general is to certify to proper form and if the subject is within the excluding clause it is not in proper form therefore his certificate is final. There seems to be a hiatus in this brief line of reasoning.

The first thing to remember is John Marshall's well-known remark that "It is a constitution that we are construing." In construing a constitution, the practical purposes of the instrument as a whole must be considered as bearing on its interpretation. Now the court did not notice the fact, that the *referendum* part contains an excluding clause in regard to which the attorney general is given no functions whatever. Why not? There is nothing to prevent a petition to the Supreme Judicial Court for mandamus to prevent a referendum question from going on the ballot because it is within the excluding clause. Why not? One would expect the court to pause at this question and consider whether the convention or the people ever intended to confine the jurisdiction of the Supreme Judicial Court to referendum questions on laws which have been approved by the considered judgment of the legislature, and to set up as final for the first time in American history the single and possibly changing, temporary judgment of shifting attorneys general on *initiative* questions which not only are rejected by the legislative judgment but have to do with proposed constitutional amendments as well as proposed laws. Such a suggestion is certainly a startling one for the bar and the public to contemplate and yet that result is what the opinion of the court seems to mean if it is to be considered as a binding precedent.

Possibly the opinion reflects the view of the work of the convention indicated in the sentence in the attorney general's brief that, "The convention perfunctorily adopted the provision," and that the "latter changes" in the clause about the attorney general's function "are fully dominated by the spirit of the earlier debates"

about the attorney general's function in another connection. But, in these remarks, "the spirit of the earlier debates" *about the excluding clauses* which were not at all perfunctory and the nature and purposes of those clauses seems to be entirely overlooked or forgotten. These clauses were the subject of most serious consideration and they were intended *to exclude* absolutely and not to be treated merely as matters of preliminary administrative detail. They were intended to protect the Bill of Rights and other fundamental principles in the constitution.

There may be some force in the argument of the attorney general that the question whether a proposed measure is in form or substance the same as one submitted within three years is a matter which may be perhaps fairly classified as among the "preliminary requirements," for it is an important, and controlling fact, that the provision as to sameness within three years does not appear in the excluding clauses—it was never raised to that position of importance. It appears in the administrative section as to the "*mode* of originating" initiative petitions. So also with the "*form* for submission to the people", a clause which the court relies on as *including* the questions of substance under the excluding clauses. If the "form" of the measure necessarily included the questions of substance under the excluding clauses there would have been no need of specifying them as an *additional* subject of the attorney general's certificate. The court says, "A petition is not in proper form if it falls within the exclusion. The Attorney General *therefore* is to pass upon this question before making his certification." But it would seem that there is no basis in the text or the history of the convention for this "*therefore*". The language of II, § 3 and its history all point the other way. It says the Attorney General is to

> "certify that measure is in proper form for submission to the people, *and* that it is not either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in December *and* that it contains only subjects not excluded from the popular initiative *and* which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth."

Thus the question of substance under the excluding clauses is specifically separated from the *form* of the measure as a special and

separable subject of a certificate. The "dominant purpose" of the excluding clauses was to *exclude* as a matter of *constitutional law,* not as a matter of the attorney general's discretion. There was nothing "perfunctory" about this considered purpose of the convention in framing the amendment. It dominates the entire document. The subjects and language of the clauses themselves which are quoted in a footnote,* and which were placed at the beginning of the amendment show this.

The exclusion is absolute *"in unequivocal words".* And yet under this opinion all these provisions are at the absolute mercy of the petition signers and the attorney general, and the people of the Commonwealth seem to be deprived of the protection which the Supreme Judicial Court was established to provide. The more one thinks out the situation under this opinion, the more difficult it is to believe that the court really intended that result or appreciated the effect of the language used in the opinion. While it was natural enough for administrative purposes for the convention to provide that the attorney general should cover in his certificate the question whether the subject was covered by the excluding clauses, just as the legislature may ask for an opinion of the attorney general as to the validity of proposed legislation, it seems strange that ten petition signers by presenting a petition should be able to confer absolute power of constitutional interpretation on the attorney gen-

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* Section 2. *Excluded Matters.*—No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the Commonwealth; or that makes a specific appropriation of money from the treasury of the Commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the Constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection of courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the Constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the General Court in the Constitution shall extend to the legislative power of the people as exercised hereunder.

eral and deprive the Supreme Judicial Court of its constitutional jurisdiction when a whole legislature has no such power.

While, of course, there was no intention to do so, the result of the opinion if followed in practice, would seem to be, in the light of the history of the constitutional clauses and their relative importance and relation to each other, an abdication by the Supreme Judicial Court of its judicial function of interpreting the constitution. This would result in giving the attorney general's opinion greater force, at least, as a temporary precedent, than that of the Supreme Judicial Court. We use the word "temporary" for there is no doctrine of *stare decisis* by which the court will be bound by the attorney general's certificate until some successor gives a different certificate, both of them prepared, perhaps, by one of their assistants who may, or may not, be competent to prepare it.

Hitherto, the attorney general has been a quasi-judicial officer. This opinion would seem to treat him as a judicial dictator above the court during his term of office. One is led to ask what will be the effect on the stability of our body of constitutional law which as Chief Justice Rugg has said, "has been stabilized by its slow growth"?

Some one has suggested somewhere that the doctrine of *stare decisis* should be rather cautiously applied to constitutional questions which should not be considered settled until they are settled right. However that may be, in general, here certainly seems to be a constitutional case where the doctrine of *stare decisis* should not be applied. Fortunately we have no tradition like that of the English House of Lords against overruling a decision. Our courts have had the strength to change their minds occasionally.

Now, if the views above expressed are sound, how can the court get rid of this opinion as a precedent when its nature and possible consequences are studied. The simplest and strongest way, which seems within the power of the court, would be to recall the opinion and let the judgment stand as a discretionary denial of the writ on the rescript which can be published under G. L., c. 211, § 9. Such a course would not be without precedent in Massachusetts and in a recent opinion by the Supreme Court of the United States we find the following passage in reference to an earlier recent opinion:

> "Upon a re-examination of the record it becomes plain that we misapprehended the opinion and ruling of the lower

court; also that the reason advanced to support our conclusion is insufficient." (*U. S.* v. ***Boston Ins. Co.,*** 269 U. S. 197 at p. 203, "Preliminary Print No. 2".)

The opinion is not essentially part of the case. No harm would result from such a course for the court has subsequently issued a writ of mandamus to prevent the "Sunday Sports" question from appearing on the ballot because of a lack of signatures discovered since the opinion in the Anderson case was filed. This second case, of *Brooks* v. *The Secretary* hereinafter printed, in which the mandamus writ was issued, shows that the opinion in the Anderson case was entirely unnecessary ***in fact*** so that it is really reduced to the level of a mere dictim, even if the court does not feel moved to withdraw it. However it is dealt with, the best traditions of the court seem to call for a full reconsideration of the question when it next arises. We can not believe that this opinion will stand permanently as a statement of the constitutional law of Massachusetts.

F. W. GRINNELL.

A SOUND ADVISORY OPINION.

OPINION OF THE JUSTICES AS TO WHETHER OR NOT THE BILL TO ESTABLISH CONGRESSIONAL COUNCILLOR AND SENATORIAL DISTRICTS AND TO APPORTION REPRESENTATIVES WOULD BE SUBJECT TO A REFERENDUM PETITION.

The undersigned, justices of the Supreme Judicial Court, have received a communication from the Honorable the House of Representatives as follows:

HOUSE OF REPRESENTATIVES, April 21, 1926.

Whereas, There is pending before the General Court a bill (Senate, No. 328) to establish congressional, councillor and senatorial districts and to apportion representatives; and

Whereas, Doubt exists as to whether or not the provisions of Article XLVIII of the Amendments to the Constitution of the Commonwealth relative to the Referendum would apply to such a measure, if enacted; therefore be it

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required by the House of Representatives on the following important question of law: Would the above mentioned bill, if enacted, be subject to a referendum petition under said provisions?

The Constitution of the Commonwealth as amended, Art. XVI, provides that councillor districts shall be eight in number of contiguous territory and each shall consist of five contiguous senatorial districts, each to contain as nearly as may be an equal number of legal voters, with the further requirement that wards and towns shall not be divided.

The House of Representatives, by Art. XXI, consists of two hundred and forty members to be apportioned by the Legislature in the several counties of the Commonwealth equally, as nearly as may be, according to the relative number of legal voters as ascertained by the next preceding special enumeration. Then follow provisions for dividing counties into representative districts by the mayor and aldermen of the city of Boston, the county commissioners of other counties, or, in lieu thereof, by such special commissioners in each county as may be provided by law.

By U. S. Sts. at L. Vol. 37, c. 5, § 4, approved August 8, 1911, it is provided: "That in case of an increase in the number

of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed." Section three provides "That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

The mode and time of apportionment are prescribed by the Constitution of the Commonwealth and it must be held that the people designed that it should be exercised at that time and by that mode only. In construing statute or constitutional provisions, the court looks to the history of the times when the constitution or law was made, and into the proceedings of those forming the organic law. *Rhode Island* v. *Massachusetts*, 12 Pet. 657. Nothing seems to have been left to implication. Cooley, Const. Lim. 7th ed. pp. 114, 115. *Opinion of Justices*, 10 Gray, 613, 624. *Opinion of Justices*, 142 Mass. 601.

The various districts are political divisions for the election of the various officers described in the amendments, as well as for the election of Representatives to Congress under the federal law. The voters of one district may deem themselves aggrieved by the apportionment, while the voters of another district may be satisfied with it. It is true that the apportionment territorially covers the Commonwealth. But if it had been the purpose of the people to submit to the qualified voters on referendum the apportionment where there are or may be diversified local interest, the language of Art. XLVIII, Sec. 3, Sub-Section 1, excludes such construction.

It is inconceivable, in view of the confusion which might result from a referendum where the representative districts are determined by some tribunal other than the Legislature, that it could have been intended that the referendum was to be applicable to

the congressional, senatorial and councillor districts, while it could not in any event apply to the representative districts. It has been said: "Principles of public policy constitute one of the resources of law. Where the decision of a case is not plainly governed by some constitutional provision, statute, or rule of law, and on previous authoritative decision seems to be applicable, such principles should be, and doubtless are, given consideration by the court." This conclusion is supported also by the language of Art. XLVIII, The Referendum, Sec. 3, Sub-Section 1, which excludes from its operation matters relating "to a city or town or other political division, or to particular districts or localities of the Commonwealth." It is a cardinal rule of interpretation that "Where a provision general in its language, is followed by a proviso, the rule applicable to such cases occurring in statutes has been applied to constitutions, viz: that the provision is to be strictly construed, as taking no case out of the provisions that do not fairly fall within the terms of the proviso, the latter being understood as carving out of the provisions only specified exceptions, within the words as well as within the reason of the former." Endlich, Interpretation of Statutes, c. 18.

The proposed Act, by its terms, is to "establish Congressional, Councillor and Senatorial Districts and to apportion Representatives." But when this has been accomplished by the Legislature, to which the power has been delegated by the Constitution, and in the manner therein provided, nothing further remains to be done. *Opinion of Justices,* 10 Gray, 613. *Donovan* v. *Suffolk County Apportionment Commissioners,* 225 Mass. 55, 58.

We have not overlooked the decisions in *State* v. *Hildebrand,* 94 Ohio St. 154; *S. C.* 241 U. S. 565, *State* v. *Polley,* 26 S. D. 5, and *Opinion of Justices,* 118 Maine, 552. The provisions in the constitutions of the states of Ohio, South Dakota and Maine, relating to the same subject matter, are distinguishable from the provisions of our own Constitution. The Constitution of Ohio, Art. 2, Sec. 1 (d), as summarized in the opinion in *State* v. *Hildebrand, supra,* provides that ". . . laws providing for tax levies and certain emergency laws, when passed by a yea and nay vote of two-thirds of all members elected to each branch of the general assembly, shall go into immediate effect and shall not be subject to the referendum imposed by the preceding section. As to all other laws passed by the general assembly, the people have reserved to themselves the power of adoption or rejection."

Art. 3, Sec. 1 of the Constitution of the State of South Dakota provides: "The legislative power shall be vested in a Legislature . . . Except that the people expressly reserve to themselves the right to . . . require that any of the laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions)."

The Thirty-first Amendment to the Constitution of the State of Maine declares: "No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch thereof, or of any committee or officer thereof, or appropriate money therefor, or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it unless in case of emergency, . . ."

It follows that the question propounded must be answered in the negative.

The Chief Justice has been unable to participate in the consideration of this question.

HENRY K. BRALEY.
JOHN C. CROSBY.
EDWARD C. PIERCE.
JAMES B. CARROLL.
WILLIAM CUSHING WAIT.
GEORGE A. SANDERSON.

APRIL 29, 1926.

A SOUND JUDICIAL DECISION

ARTHUR T. BROOKS & others *vs.* SECRETARY OF THE COMMONWEALTH.

Suffolk. Submitted June 28, 1926. Opinion filed September 18, 1926.

Present: RUGG, C.J., PIERCE, CARROLL, WAIT, & SANDERSON, JJ.

Mandamus. Res Judicata. Practice, Civil, Parties. *Supreme Judicial Court,* Application for rehearing. *Constitutional Law,* In Initiative.

Reservation by *Sanderson,* J., upon the pleadings and an agreement as to the facts, of a petition for a writ of mandamus.

RUGG, C.J. This is a petition for a writ of mandamus to compel the respondent to omit from the ballot for the next State election a proposed law which he intends to print on the ballot under the initiative procedure provided by art. 48 of the Amendments to the Constitution.

1. The petitioners as citizens and voters have standing to maintain this petition. That is settled by *Brewster* v. *Sherman,* 195 Mass. 222, where Chief Justice Knowlton, after saying that the proposition that in order to maintain a petition for a writ of mandamus one should have a private right or interest in the matter beyond the right and interest of citizens in general, had sometimes been stated as the rule and was correct in its application to some cases, and referring to *Wellington, petitioner,* 16 Pick. 87, 105, and *Pearsons* v. *Ranlett,* 110 Mass. 118, 126, stated the general rule to be: "'When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws.' . . . This is the

rule applied in *Union Pacific Railroad* v. *Hall*, 91 U. S. 343, 354, 355, and, as shown in that case, it prevails also in England. . . . In *Attorney General* v. *Boston*, 123 Mass. 460, 479, Chief Justice Gray says: 'There is a great weight of American authority in favor of the doctrine that any private person may move, without the intervention of the Attorney General, for a writ of mandamus to enforce a public duty not due to the government as such.'" That general rule has been affirmed and applied in *Weld* v. *Board of Gas & Electric Light Commissioners*, 197 Mass. 556, 559; *Sinclair* v. *Mayor of Fall River*, 198 Mass. 248, 256; *Cox* v. *Segee*, 206 Mass. 380, 381; *Attorney General* v. *Suffolk County Apportionment Commissioners*, 224 Mass. 598, 610; *Donovan* v. *Suffolk County Apportionment Commissioners*, 225 Mass. 55, 57; *Loring* v. *Young*, 239 Mass. 349, 357. *Kelley* v. *Board of Health of Peabody*, 248 Mass. 165, 169. *O'Brien* v. *Turner*, 255 Mass. —— [Adv. Sh. (1926) 477]. *Bancroft* v. *Building Commissioner of Boston*, this day decided, *ante*. See *Anderson* v. *Secretary of the Commonwealth*, 255 Mass. —— [Adv. Sh. (1926) 807]. The decision in *McGlue* v. *County Commissioners of Essex*, 225 Mass. 59, is quite distinguishable. *Frothingham* v. *Mellon*, 262 U. S. 447, 486, 487, rests upon grounds inapplicable to the case at bar. See *Baldwin* v. *Wilbraham*, 140 Mass. 459.

Mandamus is a discretionary writ and issues only in the exercise of sound judicial discretion. *Smith* v. *Commissioner of Public Works of Boston*, 215 Mass. 353, and cases there cited. *Brattin* v. *Board of Civil Service Commissioners*, 249 Mass. 170. Hence there is little danger that the public interests will be adversely affected by the institution of litigation by volunteers and strangers. Where genuine wrongs and something more than faults purely technical, or failure in literal compliance with subsidiary requirements, are not disclosed, courts would not be likely to entertain such petitions.

The case at bar falls within the rule of *Brewster* v. *Sherman*. The present petitioners seek the enforcement of public duty by an officer with respect to a public right in which the voters at large have an interest.

2. The decision in *Anderson* v. *Secretary of the Commonwealth*, 255 Mass. ——, is not a bar to the present proceeding. That was a petition to require the defendant not to put upon the ballot the same question which is described in the present petition. No one of the present petitioners was a party to that proceeding. The question of law there raised was wholly different from that raised in the case at bar. No allusion was made in that petition to the ground on which the present petition rests. This ground was not within the scope of the petition in the Anderson case. It could not have been made the basis of relief in that case without an amendment to the petition. It is contended that the decision in the Anderson case is a bar under the doctrine of *res judicata*. Estoppel by *res judicata* can be invoked as a defence when the plaintiff was either a party or a privy to a prior judgment on the same cause of action brought against the same defendant. It is a doctrine quite different from that of *stare decisis*. The present petitioners were not parties to the Anderson case. It cannot be said with due regard to the commonly accepted definitions of privity that one citizen as member of the general public is a privity with another such citizen with whom he has had no relations in fact. The definition of privity in 1 Greenleaf on Evidence, § 535, adopted by the Supreme Court of the United States in *Litchfield* v. *Goodnow's Administrator*, 123 U. S. 549, 551, namely, "Mutual or successive relationship to the same rights of property," cannot well be stretched to include a case like the present. In *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, at 218, it is said: "One comprehensive definition of privies is such persons as are 'privies in estate — as donor and donee, lessor and lessee and joint tenants; or privies in blood — as heir and ancestor; or privies in representation — as executor and testator or administrator and intestate; or privies in law — where the law without privity in blood or estate casts land upon another, as by escheat.' *Buckingham* v. *Ludlum*, 10 Stew. 137, 141. *Douglass* v. *Howland*, 24 Wend. 35, 53." The doctrine of *res judicata* also is founded in part on the fact that it is in the interests of the Commonwealth and

conserves the peace and repose of society that questions once decided should be forever removed from litigation. On principle it is difficult to conceive of different citizens, who in fact have no relation to each other except their common citizenship, who may reside in different communities and who may know nothing about the actions of each other, having a privity of interest in litigation without any information concerning it. The question of law now raised was not within the scope of that petition. The circumstance that an application for a reargument of that case was made, in which reference is made to the point here presented, is of slight, if any, consequence. "Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error." *Wall* v. *Old Colony Trust Co.* 177 Mass. 275, 278. *Powers* v. *Sturtevant*, 200 Mass. 519, 521. It is too elementary for discussion that a case cannot be decided on grouuds not raised by its pleadings or evidence. It has sometimes been said that the doctrine of *res judicata* applies by analogy to proceedings having a more or less remote similitude to the case at bar.* We do not pause to review such decisions, nor to determine how many of them are distinguishable on grounds of State procedure or difference in decisive facts, because the present decision rests upon other grounds. Whatever may be said about the doctrine of suits by a few as representatives of a class, *Spear* v. *H. V. Greene Co.* 246 Mass. 259, 266, 267, that principle does not seem to us necessarily applicable to a case like the present. The case at bar relates to the exercise of fundamental rights under the Initiative and Referendum Amendment to the Constitution. It touches voting throughout the State upon a matter of public interest. More or less discussion of fundamental public policy is involved touching

* *Tallassee* v. *Alabama*, 206 Ala. 169. *People* v. *Clark*, 296 Ill. 46, 50. *Greenberg* v. *Chicago*, 256 Ill. 213. *Sabin* v. *Sherman*, 28 Kan. 289. *Floersheim* v. *Board of Commissioners*, 28 N. M. 330, 335. *Eaton* v. *Mooresville Graded School*, 184 N. C. 471. *State* v. *Willis*, 19 N. D. 209. *Ashton* v. *Rochester*, 133 N. Y. 187, 193. *State* v. *Chester & Lenoir Railroad*, 13 S. C. 290. *Lindsay* v. *Allen*, 112 Tenn. 637, 655, 656, 657. *Hovey* v. *Shepherd*, 105 Texas, 237. *State* v. *Superior Court*, 70 Wash. 670. 1 Freeman on Judgments, 5th Ed. §§ 437, 510.

a subject about which there may be a wide divergence of views. The Constitutional Amendment as to the Initiative and Referendum is comparatively new. The practice under it has not become fixed by experience or custom. It is of primary public importance that the submission of questions to a State wide vote should follow the requirements of that Amendment. We are of opinion, in view of all the circumstances here presented, that the case at bar ought to be considered on its merits and that the doctrine of *res judicata* ought not to be applied. *Price* v. *Gwin*, 144 Ind. 105. *Detroit* v. *Detroit Railway*, 134 Mich. 11. *State* v. *Stock*, 38 Kan. 184. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 58. *Boyd* v. *Alabama*, 94 U. S. 645, 648.

3. An initiative petition was duly filed and introduced into the General Court in accordance with art. 48, Part II, §§ 3, 4, Part V, § 1, of the Amendments to the Constitution, having been signed by not less than twenty thousand voters. By the vote taken by the General Court under Part V, § 1, the proposed law failed of enactment. Further procedure is provided by Part V, § 1, in these words: "If an initiative petition for a law is introduced into the general court, signed by not less than twenty thousand qualified voters, a vote shall be taken by yeas and nays in both houses before the first Wednesday of June upon the enactment of such law in the form in which it stands in such petition. If the general court fails to enact such law before the first Wednesday of June, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following July nor later than the first Wednesday of the following August, not less than five thousand signatures of qualified voters, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of June aforesaid, then the secretary of the commonwealth shall submit such proposed law to the people at the next state election." The words "such petition" in the second sentence of this quotation refer to the "initiative petition," requiring the signatures of twenty thousand qualified voters, and described with its essential procedure in Part II, §§ 2 and 3. Material

words in § 3 are as follows: "Such petition shall first be signed by ten qualified voters . . . and . . . [after proceedings not here relevant] . . . it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed measure as such description will appear on the ballot together with the names and residences of the first ten signers." The additional signatures of not less than five thousand voters must be appended to a petition the same in substance as the initiative petition signed by not less than twenty thousand voters. Such additional signatures of not less than five thousand voters are included within the words, "for the use of subsequent signers," for whom the blanks must be provided by the secretary of the commonwealth. That is the fair interpretation of the words of the Amendment. That construction, also, is the one most consonant with the general design and purpose of the Initiative. Both petitions are in the end part of the same petition, the only distinction being the different times at which the signatures may be procured. Both must follow the same procedure.

The description of the proposed measure as it will appear on the ballot must be determined by the Attorney General. "General Provisions," Part III. It is that description which must be in the "initiative petition," signed both by the twenty thousand qualified voters required for the introduction of the measure into the General Court and by the additional five thousand qualified voters required for putting the proposed law on the ballot. That description is not required on the petition signed by the original ten signers, because not made until after that petition is filed. That petition contains the text of the proposed measure. That description in the case at bar, as prepared by the Attorney General, was in these words:

"'An Act to permit certain sports and games on the Lord's day.'

"Description of Proposed Law.

"The proposed law provides that it shall be lawful in any city which accepts the act by vote of its city council and in

any town which accepts the act by vote of its inhabitants, to take part in or witness any athletic outdoor sport or game, except horse racing, automobile racing, boxing or hunting with firearms, on the Lord's Day between 2 and 6 P.M., that such sports or games shall take place on such playgrounds, parks or other places as may be designated in a license issued by certain licensing authorities; that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship; that the charging of admission fees or the taking of collections or the receiving of remuneration by any person in charge of or participating in any such sport or game shall not be prohibited; that the license may be revoked; and that in cities and towns in which amateur sports or games are permitted under existing law such amateur sports or games may be held until the proposed law is accepted or the provisions of the existing law fail of acceptance or resubmission to the people."

The additional petition signed by the "not less than five thousand signatures of qualified voters, in addition to those" who had already signed the initiative petition, described the proposed law in these words: "Shall the proposed law which provides that it shall be lawful in all cities and towns, where the mayor and city council or selectmen accept the act, to participate in or witness a game of baseball on the Lord's Day, between two and six P.M., where the players are paid for their services; that an admission fee to such games may be charged, and that such games shall take place in such parks or places as may be designated in a license or permit issued by the city council, with the mayor's approval, or by the selectmen, which law was disapproved in the Senate by a vote of 7 in the affirmative and 25 in the negative, and in the House of Representatives by a vote of 51 in the affirmative and 152 in the negative, be approved?"

It is manifest that there are substantial and vital differences between the proposed law and the description of it contained in the initiative petition signed by not less than twenty thousand voters, on the one hand, and the description of it contained in the additional petition signed by five

thousand voters, on the other hand. The proposed law permits under the specified conditions "any athletic outdoor sport or game, except horse racing, automobile racing, boxing or hunting with firearms, on the Lord's Day," while the additional petition last filed describes the proposed law as permitting "a game of baseball on the Lord's Day." The proposed law provides that it shall become operative in towns when accepted by vote of its inhabitants, while the additional petition provides that it shall be operative in towns when accepted by the selectmen. Such divergence and variation in matters of substance are not in conformity to the requirements of the Amendment. The provisions of the Amendment are mandatory. They are not merely directory. *Attorney General* v. *Methuen*, 236 Mass. 564, 575, 576. This divergence of description is not overcome or met by the reference to the vote in the two Houses upon a law. That law was not before the voters in signing the additional petition. The precise and limited description of the proposed law in that petition cannot by any rational construction or interpretation be held to apply to such a law as accompanied the initiative petition.

It follows that there has been no substantial compliance with the imperative requirements of Amendment 48 as to putting on the ballot a question under the initiative petition. Therefore, the law ought not to be submitted to the voters.

Peremptory writ to issue as prayed for.

S. W. Mendum & H. S. Davis, for the petitioners.

J. R. Benton, Attorney General, *A. Lincoln*, Assistant Attorney General, *& M. F. Weston*, Assistant Attorney General, for the respondent.